75-7881

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA and SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

vs.

OLIVER I. SABALA, Individually and on Behalf of All Others Similarly Situated, and LEONARD M. RAMIREZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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Cases Cited

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter "International") and Southern Conference of Teamsters (hereinafter "Southern Conference") respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above consolidated cases entered upon August 4, 1975 (extension of time for filing this Writ granted until December 2, 1975).

The facts of these consolidated cases and questions presented herein are, in important respects, similar and related to those pre-

sented in *International Brotherhood of Teamsters v. United States of America* (No. 75-636, October Term 1975) and *Southern Conference of Teamsters v. Rodriguez* (No. 75-715, October Term 1975).[1]

OPINIONS BELOW

The Opinion of the Court of Appeals in the cases here presented is reported at 516 F.2d 1251 (5th Cir. 1974) and reproduced in the Appendix hereto (A. pp. A-51-90).[2]

The Trial Court's Opinion (reported at 362 F.Supp. 1142), subsequent modification thereof and Judgment are reproduced in the Appendix hereto at App. pp. A-1-50.

JURISDICTION

The Judgment of the Court of Appeals herein was entered upon August 4, 1975. (App. pp. A-91-92). Thereafter, by order of this Court entered upon October 30, 1975, the time for filing this petition was extended until December 2, 1975. This petition is filed within the time fixed by this latter date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1

Does a union violate 42 U.S.C. § 1981, solely by the establishment and continuation of a seniority system which provides

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[1] Consolidated in one petition with *Southern Conference of Teamsters v. Herrera* and *Southern Conference of Teamsters v. Resendis*.

[2] The Appendix hereto is presented in an appended volume, designated "App.".

job seniority from date of entry into the bargaining unit, where the union proposes seniority from the date of discrimination for employees who have been discriminatorily excluded from the bargaining unit by the employer?

2

Whether an International Union can be held liable under 42 U.S.C. 1981 for seniority rules incorporated in a locally-negotiated portion of a collective bargaining agreement, where an appellate court has held that the same International Union is not liable upon identical facts in an identical case?

3

Whether alleged discriminatees in a 42 U.S.C. 1981 case should, as part of the relief granted therein, be awarded job seniority greater than the seniority they would have had "but for" the employer's discrimination against them?

STATUTORY PROVISIONS

Title 42 U.S.C. § 1981 is reproduced in the Appendix herein at App. p. A-93.

STATEMENT OF THE CASE

A

Nature of the Case

The consolidated cases here presented for review are, in all important respects, identical to those presented in *International Brotherhood of Teamsters v. United States* (No. 75-636, Oc-

tober Term 1975) and *Southern Conference of Teamsters v. Rodriguez* (No. 75-715, October Term 1975). Collective bargaining agreements between local unions and freight industry employers are in each instance the basis for claims that union entities have violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. Here, because the plaintiffs refused to comply with Title VII jurisdictional prerequisites, the claims against union entities were brought solely under 42 U.S.C. § 1981.[3]

In these cases, as in *Southern Conference of Teamsters v. Rodriguez, supra,* plaintiffs were "city" drivers working at the Houston terminal of their employer Western Gillette, Inc., complaining that Western Gillette had discriminatorily denied to them "road" driver jobs and that this discriminatory denial of road work has been perpetuated by the seniority system set out in collective bargaining agreements in effect at the Houston terminal. The consolidated cases proceeded as a class action on behalf of "all Mexican-Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." (App. pp. A-11-13).

As in *International Brotherhood of Teamsters v. United States* and *Southern Conference of Teamsters v. Rodriguez,* the Trial Court here found that the responsibility for hiring and initial job assignment rested solely with the employer, Western Gillette. Thus, plaintiffs' claims and the Fifth Circuit's opinion, as to the union entities involved, were restricted solely to consideration of a theory of "lock-in" discrimination by the contractually-created seniority system which governed job bidding and lay-off rights of road and city motor freight employees. (App. pp. A-10-11, 57).

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[3] The Trial Court properly dismissed all Title VII claims against union defendants because of plaintiffs' failure to file a sworn charge against them, as required by Title VII. (App. pp. A-14-15). Plaintiffs did not appeal that ruling.

B

Undisputed Facts as to the Seniority System

As in *Southern Conference of Teamsters v. Rodriguez* and *International Brotherhood of Teamsters v. United States*,[4] plaintiffs and the class members they represent were at all relevant times city motor freight employees (drivers) of Western Gillette; located at that employer's Houston, Texas terminal. Each had been originally hired in that capacity.

The terms and conditions of employment, including wages, hours and seniority rights for city and road motor freight employees of Western Gillette were contained in two separate collective bargaining agreements covering, respectively, city employees on the one hand and road employees on the other.

Under these separate collective bargaining agreements, city drivers are those performing the functions necessary to operation of a local pick-up and delivery freight service in the immediate Houston area. Road employees are exclusively long haul drivers. Under the contract defining their terms and conditions of employment, city employees are all paid the same hourly wage, slightly higher than that paid to road employees. Fringe benefits for the two groups of employees (city and road) are identical. City employees have a weekly guarantee of forty (40) hours, with time and one-half and in some instances double time for hours per week over that figure. Road employees have a weekly guarantee and do not receive premium pay for overtime work. Despite the absence of a weekly hour guarantee, many road employees nevertheless have an opportunity to earn a larger annual salary than that paid to city employees by working longer hours (sometimes up to 70 hours per week).

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[4] Of course, in *International Brotherhood of Teamsters v. United States, supra,* the Government sued on behalf of individuals who were city motor freight employees.

At the same time, road employees bear many of their own living expenses incurred out of town, work longer hours and are away from their home and families for many days at a time. Thus, while road employment generally affords employees the opportunity of work for higher earnings, many employees choose and prefer to do city work. In no sense is there a "line of progression" from city to road jobs, nor can city jobs (affording an average yearly earning of more than $13,000.00) be characterized as "low paying" or "menial."[5]

The seniority rules at issue were negotiated by area (here, Southern Conference) union committees into area contract supplements, following negotiation of a "Master Agreement" applicable nationwide. They provide for separate job bidding and lay-off seniority for city motor freight employees and road motor freight employees with Western Gillette. Supplemental agreements, which govern job seniority rules of city and road employees, are negotiated by an area (in this case Southern Conference) committee, operating on the basis of written "powers of attorney" given to area committees by local unions, which are the exclusive collective bargaining representatives of both city and road employees.

Historically, both because of patterns of organization of motor freight employees and because of decisions rendered by the National Labor Relations Board,[6] there have existed separate

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[5] See discussion, pp. 13-14, *infra*.

[6] See *In re Georgia Highway Express*, 150 NLRB 1649 at 1651, where the Board held:

> ". . . The Board has long held that local drivers and over-the-road drivers constitute separate appropriate units where there is shown to be clearly defined, homogeneous, and functionally distinct groups which separate interests which can effectively be represented separately for bargaining purposes. . . .
>
> In view of the different duties and functions, separate supervision, and different bases of payment, it is clear that the over-the-road drivers have divergent interests from those of the employees in the unit sought and should not be included in that unit."

collective bargaining units for road employees on the one hand and city employees on the other. One of the results of this historical pattern of separate collective bargaining units has been the development of separate collective bargaining agreements covering city employees on the one hand and road employees on the other. Separate agreements at the Houston terminal for Western Gillette's city employees and road employees provided for job bidding and lay-off seniority for road employees on the one hand and city employees on the other beginning with the date of entry of the particular employee into that particular (city or road) bargaining unit. Employees in both city and road job classifications have historically and continuously preferred this separation of road and city job bidding and lay-off seniority.

The seniority system requires that when Western Gillette permits an employee to transfer between the road and city job classifications, that employee maintains his company seniority for fringe benefit purposes, but assumes job bidding and lay-off seniority in his new job only from the date of employment therein. The uncontradicted evidence at trial was that seniority rules apply to job applicants and employees regardless of race or national origin. Thus, any city employee, whether Anglo, Mexican-American or black is required to give up his city job bidding and lay-off seniority when moving to a road job, assuming road job bidding and lay-off seniority only from the date of entry into the road bargaining unit job classification. Trial evidence showed that numerous employees had chosen to do just that—give up their city job seniority and transfer to the road, assuming road job seniority only from the date of employment on the road.

The contract seniority system, including the rules governing job bidding and lay-off seniority, has never been used by union entities to deny to individuals discriminatorily denied employment on the road (or for that matter in city job classifi-

cations) job bidding and lay-off seniority from the date they would have been employed in such a classification "but for" unlawful discrimination against them. To the contrary, union entities involved here consistently insisted upon application of a "rightful place" seniority concept for those individuals who allege and prove discriminatory denial of employment in, *inter alia*, the road motor freight employee classification.

C

The Trial Court's Decision

The Trial Court determined that Western Gillette had discriminatorily denied plaintiffs and the class employment as road drivers, both by original hire and transfer policy. Having so concluded, the Trial Court further found that the contract seniority system discriminatorily "locked-in" minority city drivers to their city jobs by requiring that they give up their city job seniority in transferring to road positions. (App. pp. A-21-23). The International Union and Southern Conference were held to have violated 42 U.S.C. § 1981 by virtue of their "intricate involvement in the contract negotiations that led to the agreements in question."[7] Noting that the seniority system in effect was not facially discriminatory, the Trial Court nevertheless noted that "this is not enough of an answer. These union organizations have a duty under Section 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. Unions under Section 1981 have an affirmative obligation to protect members from illegal discrimination. This duty includes the responsibility to determine if the agreements they help negotiate lock-in any such past discrimination." In so holding, the Trial Court omitted reference to trial evidence

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[7] Citing *Sagers v. Yellow Freight Systems, Inc.*, 4 FEP Cases 1297 (N.D.Ga. No. 13510, July 21, 1972).

showing that numerous individuals had, nevertheless, transferred from the city to the road driver classification, accepting as a condition of such transfer loss of city job seniority. Implicitly acknowledging that neither Southern Conference nor International was the collective bargaining representative of plaintiffs and the class, the Trial Court further concluded that no union entity (including the local union) had breached its duty of fair representation to plaintiffs or the class. (App. p. A-30). Having so found, the Trial Court assessed all back pay due against Western Gillette, but awarded seniority relief to plaintiffs and the class based upon the existence and filling of road vacancies throughout Western Gillette's terminals within the jurisdiction of the Southern Conference of Teamsters.[8]

The Trial Court based this award of seniority, not upon a finding that plaintiffs and the class would have been awarded every road job within the Southern Conference "but for" Western Gillette's discrimination in filling of road jobs by hiring or transfer, but rather upon the existence of "modified system seniority" within the Southern Conference area and "changes of operation" which had occurred in the same area. It was uncontradicted that neither "modified system seniority" nor "changes of operation" affected the filling of road vacancies—either by hiring or transfer.

D

The Court of Appeals' Opinion

The Court of Appeals for the Fifth Circuit affirmed the Trial Court's finding of violation on behalf of all union en-

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[8] The Southern Conference's jurisdiction extends from Florida to Texas, including the states of Florida, Georgia, Tennessee, Mississippi, Alabama, Louisiana, Arkansas, Oklahoma, and Texas.

tities, and the seniority relief granted by the trial court. Further, relying upon an inapposite decision involving hiring discrimination in a plant, line-of-progression job classification context[9] the Fifth Circuit remanded to the Trial Court for further consideration of the latter's finding that Western Gillette alone was responsible for back pay to plaintiff and the class. (App. pp. A-84-86).

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[9] *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1394 (5th Cir. 1974). See further discussion, *infra*, pp. 13-14.

REASONS FOR GRANTING THE WRIT

I

The Seniority System Is a Legal, "Bona Fide System."

The seniority rules here involved are identical to those in *International Brotherhood of Teamsters v. United States* (No. 75-636, October Term 1975), and *Southern Conference of Teamsters v. Rodriguez* (No. 75-715, October Term 1975). "Seniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335 at 346-47 (1964). That is true as to both city and road employees. Seniority rules at issue here and in the other cases which we mentioned affect hundreds of thousands of employees in the freight industry. Litigation concerning the rules' legality has proliferated beyond control,[10] without final resolution. The legality of the seniority system and the liability of union entities negotiating for it thus presents a problem which must be resolved by this Court. Here, as in *Rodriguez*, the Fifth Circuit concluded that union defendants violated 42 U.S.C. §1981 because the contract seniority system does not automatically provide road bargaining unit seniority for black and Mexican-American city drivers whom Western Gillette had discriminatorily excluded from the road bargaining unit. The absence of such a specific provision in the city and road contracts applicable at the Houston terminal, along with the contract seniority rules which provided for road job seniority beginning with the date of a particular employee's entry into the road bargaining unit, was deemed discriminatorily to "lock-in" to city jobs Mexican-

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[10] Nearly one hundred such cases are pending or have been decided by lower courts throughout the federal judiciary system. See Fn. 26 of Petition of International Brotherhood of Teamsters, *International Brotherhood of Teamsters v. United States* (No. 75-636, October Term 1975.)

Americans and Blacks whom Western Gillette had discriminatorily excluded from road employment. Thus, the theory upon which the Fifth Circuit (and here the Trial Court) found the contract rules and union defendants violative of 42 U.S.C. 1981 is precisely the same as in *Rodriguez*.

This Court has not fully delineated the substantive prohibitions, guarantees and available remedies of 42 U.S.C. §1981. In *Johnson v. Railway Express Agency*, — U.S. —, 44 L. Ed. 2d 295 (May 19, 1975), the Court held that the filing of a charge under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, did not toll the applicable statute of limitations as to a claim under 42 U.S.C. 1981. And in so holding, this Court stated "We generally conclude, therefore, that the remedies available under Title VII and Section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." (*Id.* at 302). Various Circuit Courts have concluded that the prohibitions and remedies available under 42 U.S.C. 1981 are in important respects almost identical to those of Title VII.[11] On the other hand, the Court of Appeals for the District of Columbia has stated without full explication, that "Section 1981 and Title VII, in truth, provide for . . . radically different schemes of enforcement and differ . . . widely in their substantive scopes . . ." *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

While it may now be taken as well-established that Title VII prohibits facially neutral policies which "freeze an entire generation of (minority) employees into discriminatory patterns that existed before the Act (Title VII),[12] it is not at all clear

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[11] *E.g., Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), cert. den. 400 U.S. 911 (1970).

[12] *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 at 445 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

that Section 1981 is violated merely by the existence of seniority rules, neutral both on their face and in their origin, which are preferred by the vast majority of employees, including black and Spanish-surnamed city employees. This Court has never so held. So that Section 1981's prohibitions and available remedies thereunder can be fully defined, this petition should be granted.

But even assuming that the substance and prohibitions of Section 1981 are identical in all respects to those of Title VII, the Fifth Circuit commits serious error when it holds this contract seniority system illegally discriminatory. The Fifth Circuit's complaint—that the system does not automatically provide for Western Gillette's black and Spanish-surnamed city drivers in Houston to transfer to road jobs taking their full city seniority with them—is misplaced. No seniority system can automatically provide seniority for individuals whom an employer excludes from it. This, the Fifth Circuit itself has recognized.[13] But union defendants here have negotiated and contracted for a provision, in collective bargaining agreements covering Western Gillette's Houston employees prohibiting race or national origin discrimination.[14] Further, union defendants have consistently proposed that minority city drivers who have been discriminatorily denied road employment be awarded the opportunity to transfer to the road, with job seniority in the

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[13] *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted, No. 74-728, October Term, 1974; *Watkins v. Steel Workers*, 516 F.2d 41 (5th Cir. 1975).

[14] The National Master Freight Agreement, part of the agreements covering Houston city and road employees, provides at Article 38 as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin."

road bargaining unit from the date they would have obtained road employment absent discrimination. No contract seniority system or union can do more than this.

The contract seniority system in effect at Western Gillette's Houston terminal has legitimate, non-discriminatory origins. It is the seniority system that both city and road employees there desire. City jobs are not menial jobs. They pay well, and many employees, both minority and white, prefer them to road jobs. City jobs are not in a line of progression with road jobs. In sum, the seniority system here is wholly distinguishable from a plant, line-of-progression job classification seniority system which draws artificial distinctions within a single bargaining unit and locks minorities into the most menial, low paying jobs which no employee with any choice desires to fill.[15] If there can be a "bona fide seniority system," which Title VII[16] (and by implication Section 1981) recognizes and purports to protect, this system must be one.

This Court must resolve all questions as to the legality of the seniority system at issue.

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[15] See *Quarles v. Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970).

[16] Section 703 of Title VII, 42 U.S.C. 2000e-2, subparagraph (h) provides that "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system. . . ."

II

The Fifth Circuit's Finding of Liability on Behalf of International Conflicts With Its Own Holdings in Herrera v. Yellow Freight Systems, Inc.[17] and Resendis v. Leeway Motor Freight, Inc.[18]

We have, to the point of redundance, stated that the seniority rules here involved are identical to those in *Herrera v. Yellow Freight* and *Resendis v. Leeway* (see fns. 17 and 18, *supra*). The rules are contained in local contract supplements, covering Western Gillette's Houston city drivers on the one hand and road drivers on the other, and signed by Western Gillette and Teamsters Local Union 988. These contract supplements were, as we have stated, negotiated by an area (Southern Conference) negotiating committee acting upon a "power of attorney" issued by Local Union 988. The International is not, and never has been, collective bargaining representative for Western Gillette's Houston city drivers.

On identical facts, in *Herrera*, the Fifth Circuit wrote: "Because the separate seniority lists (referring to separate job seniority for city drivers on the one hand and road drivers on the other) originate at the Southern Conference level, we find no violation of Title VII by the defendant Teamsters International." 505 F.2d at 68, fn. 2. In *Resendis*, the Fifth Circuit wrote: "We find no violation of Title VII by the defendant Teamsters International." (citing *Herrera*). 505 F.2d at 71, fn. 2.

Neither the Trial Court nor the Fifth Circuit in the instant case explains why the International's obligations should be broader under Section 1981 than under Title VII. *Herrera*

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[17] 505 F. 2d 66.

[18] 505 F.2d 69.

and *Resendis* are plain authority that International has not committed a violation of Section 1981 in regard to the seniority rules at issue. This petition should be granted for the purpose of conforming the instant case to *Herrera* and *Resendis*.

III

The Award of Seniority Relief to Black and Spanish-Surnamed City Drivers Exceeds Seniority They Would Have Had "But For" Discrimination Against Them.

The Fifth Circuit here approved the Trial Court's award to minority city drivers of the right to claim subsequently occurring road vacancies at any of Western Gillette's terminals within the Southern Conference, taking with them road job seniority *not* from the date that the individual would have been hired as a road driver at the Houston terminal "but for" discrimination, but rather from the date *any* individual was hired for a road job at *any* terminal within the Southern Conference following the individual Houston city drivers' possession of road driver qualifications. The Fifth Circuit (and the Trial Court) required no showing that individual Houston city drivers had ever sought road employment, or that such an individual could have obtained a road job at any terminal in the Southern Conference "but for" discrimination. (App. pp. A-75-77).

The determination not to require application for road employment as a prerequisite to the award of seniority relief was based upon the Trial Court's determination that such application by a black or Spanish-surnamed American would have been futile.[19] The award of seniority relief based upon the

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[19] See *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973). See also *Rodriguez v. East Texas Motor Freight, Inc.*, 505 F.2d 41 (5th Cir. 1975).

existence and filling of road vacancies at any of Western Gillette's terminals in the Southern Conference area, rather than just at Houston, was based upon the Court's mistreatment of record evidence concerning "modified system seniority" operative among road drivers in Western Gillette's Southern Conference area and the mechanics of "change of operations" decisions under applicable collective bargaining agreements.

"Modified system seniority," applicable among road drivers in Western Gillette's Southern Conference area by vote of the drivers themselves, simply means that a road driver who is laid off *following* his original hire at a particular terminal may *thereafter* exercise whatever seniority he has at that terminal to bump a less senior road driver at any other terminal within the Southern Conference area. Thus, modified system seniority operates only *subsequent* to original hire, and does not permit or otherwise affect the right of an individual at one terminal to obtain original employment as a road driver at any other terminal within the Southern Conference area.

Similarly, contractual "changes of operations" occur when an employer (in this instance Western Gillette) determines to change its freight operations, necessitating the re-domicile of *already-employed* road drivers. Under applicable collective bargaining agreements, a contractually-created change of operations committee then determines what seniority re-domiciled road drivers will possess at the terminal to which they are moved. Nothing in the "change of operations" process permits an individual at one terminal to obtain original road employment at another.

In short, when the Fifth Circuit and Trial Court granted Houston minority city drivers the right to claim road vacancies with job seniority based upon previous hiring for road employment throughout Western Gillette's Southern Conference area, it gave them road job seniority far in excess of that

which they would have had "but for" Western Gillette's discrimination against them. This fictional, super-seniority award was tied, *not* to a showing of discrimination against the individual *but rather solely to the individual's race or national origin.*

> "Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent. In light of Title VII's legislative history, ascribing such an altruistic yet impractical purpose to that legislative body would surely be erroneous—'reverse discrimination' of the most blatant sort." *United States v. Jacksonville Terminal, et al.*, 451 F.2d 418 at 445 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

By giving "all persons . . . the same right . . . to make and enforce contracts (here for employment)" we presume that Section 1981, like Title VII, does not sanction "reverse discrimination." Nevertheless, that is the real effect of the award of seniority relief by the lower courts in the instant case. Houston black and Spanish-surnamed city drivers are given road job rights and seniority relief far beyond what they would have had "but for" discrimination against them. This relief permits them to compete for and hold road jobs against both incumbent road drivers and other individuals (including, no doubt, a substantial number of black and Spanish-surnamed persons) who will hereafter seek road employment throughout Western Gillette's Southern Conference system. This, Section 1981 surely does not intend. Only by the granting of this petition can the Fifth Circuit be required to conform seniority relief accorded Houston minority city drivers to that which they would have had "but for" discrimination against them.

CONCLUSION

This Court must now be aware of the enormity of the common problem reflected by the filing of the petitions in *International Brotherhood of Teamsters v. United States, Southern Conference of Teamsters v. Rodriguez,* the instant petition, and those filed by other parties to these actions below.[20] Accordingly, and especially for the reasons set out herein, this petition for writ of certiorari should be granted.

Respectfully submitted

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[20] *TIME-DC, Inc. v. United States of America* (No. 75-636, October Term 1975); *Teamsters Local 657 v. Rodriguez,* (No. 75-651, October Term 1975); *East Texas Motor Freight, Inc. v. Rodriguez,* No. 75-718, October Term, 1975; *Leeway Motor Freight, Inc. v. Resendis,* No. . . ., October Term, 1975.

Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has this 1st day of December, 1975, been mailed, postage prepaid, to all counsel of record as follows:

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APPENDIX A

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated

v.

Western Gillette, Inc., et al.

Leonard M. Ramirez, Individually and on Behalf of All Others Similarly Situated

v.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.

Civ. A. Nos. 71-H-961, 71-H-1338.

United States District Court, S. D. Texas
Houston Division

July 17, 1973

Consolidated actions by black and Mexican American who claimed that existence of dual seniority system for "city drivers" and "road drivers" locked in past discriminatory employment practices. The District Court, Singleton, J., held that evidence established that there had been discriminatory employment practices which were locked in by existence of dual system, and court set forth appropriate relief.

Order accordingly.

1. *Federal Civil Procedure Key 184*

Allegations and evidence that employer and international, regional, and local unions acted on grounds generally applicable to class and thereby made appropriate injunctive relief with respect to class as whole demonstrated that suit based on claim that seniority systems resulted in locking in past discriminatory practices in employment could be maintained as class action even though there were only 26 members of class. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed. Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

2. *Federal Civil Procedure Key 184*

Suits to enjoin racial discrimination in employment are by their nature appropriate for class action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc rules 23, 23(b)(2), 28 U.S.C.A.

3. *Federal Civil Procedure Key 184*

Even though some relief might need to be fashioned individually, common questions of law and fact as to whether existence of racially neutral seniority system locked in past discriminatory practices as to class of Mexican Americans and blacks was enough to satisfy requirements for maintenance of class action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23 (b) (2), 28 U.S.C.A.

4. *Federal Civil Procedure Key 184*

Mexican American who brought action against employer and international, regional, and local unions for alleged discriminatory employment practices based on claim that seniority system

locked in past discrimination could adequately represent class of both Mexican Americans and blacks. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

5. *Federal Civil Procedure Key 184*

Where class action was brought against trucking company employer and international, regional and local unions for alleged discriminatory employment practices based on claim that seniority system locked in past discrimination at particular terminal, court would not expand class to include minority employees employed at employer's other terminals. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

6. *Civil Rights Key 38*

Where employees who brought civil right action against employer and international, regional, and local unions based on claim that seniority system locked in past discriminatory practices had not filed charge with Equal Employment Opportunity Commission, action could not be maintained under 1964 Civil Rights Act provisions relating to discriminatory employment practices. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. *Civil Rights Key 44(1)*

Evidence established that Mexican Americans and blacks had been discriminated against by trucking company which had only one of 29 road drivers who was member of minority group while 42 out of 65 city drivers were members of minority groups. 42 U.S.C.A. § 1981.

8. *Civil Rights Key 44(4)*

Evidence established that dual seniority system which restricted transfers between jobs of "city driver" and "road driver" locked in past discrimination. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

9. *Civil Rights Key 9.12*

Neither company nor unions can have dual seniority system that locks in past discriminations even if there happens to be no positions available at the time. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

10. *Civil Rights Key 9.12*

Present good faith on part of employer and unions has little relevance to difficult question of facially neutral but in fact discriminating seniority systems. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

11. *Civil Rights Key 39*

Overriding legitimate nonracial business purpose is defense to suit under Civil Rights Act of 1964 provisions relating to discriminatory employment practices. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. *Civil Rights Key 44(1, 4)*

Evidence failed to establish any legitimate nonracial business purpose justifying racial discrimination in hiring and transfer practices of trucking company employer which had members

of minorities as "city drivers" but limited number of "road drivers" who were members of minority groups. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981.

13. *Labor Relation Key 219*

Local union which signed agreements providing for separate seniority rosters and which was agent of its members had duty to protect its members against discrimination. National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

14. *Civil Rights Key 13.7*

International and regional union which were parties to contract containing provision leading to discriminatory employment practices violated Civil Rights Act of 1866. 42 U.S.C.A. § 1981.

15. Civil Rights Key 9.11

Union organizations have duty to inquire into effect of contract provisions when it is reasonable to assume that they might lead to discrimination. 42 U.S.C.A. § 1981.

16. Civil Rights Key 9.11

Unions have affirmative obligation to protect members from illegal discrimination and such duty includes responsibility to determine if agreements they have negotiated lock in any past discrimination. 42 U.S.C.A. § 1981.

17. Civil Rights Key 46

Even though existence of dual seniority system for "city drivers" and "road drivers" locked in past discriminatory employment practices, court would not order unified seniority roster. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

18. Civil Rights Key 46

Remedy for eliminating discriminatory practices which existed by virtue of existence of dual seniority system which locked in past discriminatory practices set forth. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2 (a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

19. Civil Rights Key 46

In class action based on discriminatory employment practices, back pay may be awarded as part of injunctive relief needed to obviate past discrimination. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

20. Civil Rights Key 46

Where there existed past discriminatory employment practices and such practices were continued as result of maintenance of dual seniority system for "city drivers" and "road drivers" city drivers who would have transferred to road positions or who would have hired on at road positions absent discrimination were entitled to recover from the company back pay equalling dif-

ference between salary they did receive and salary they would have received absent discrimination. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc. rule 23 (b)(2), 28 U.S.C.A.

21. Civil Rights Key 46

Employer may not evade its burden of having to pay to rectify discriminatory practices by saying that seniority system which locked in discriminatory practices was unions' responsibility alone. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

22. Civil Rights Key 46

Attorney's fees due plaintiffs who prevailed in civil rights action brought against employer and international regional and local unions which engaged in discriminatory employment practices would be charged one-half to employer and one-half to unions. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

23. Labor Relations Key 766

Evidence failed to establish that international, regional, or local union breached their duty of fair representation of union members who were members of minority groups and who were discriminated against by existence of dual seniority system which locked in past discriminatory employment practices. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

24. Labor Relations Key 219

Mere fact that union acquiesced in seniority system that perpetuated past discrimination did not give rise to breach of their duty of fair representation. National Labor Relations Act. § 1 as amended 29 U.S.C.A. § 151.

25. Labor Relations Key 219

In order for union to be guilty of breaching its duty of fair representation there must be evidence that union acted unfairly or unimpartially or not in good faith or with hostile discrimination. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

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Sidney Ravkind, Mandell & Wright, Houston, Tex., for plaintiff Leonard M. Ramirez.

L. G. Clinton, Jr., Fulbright, Crooker & Jaworski, Houston, Tex., for defendant Western Gillette, Inc.

L. N. D. Wells, Jr., G. William Baab, Mullinax, Wells, Mauzy & Baab, Dallas, Tex., for defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Southern Conference of Teamsters.

James P. Wolfe, Houston, Tex., for Local Union 988, Teamster, Freight, Tank Line and Automobile Industry.

SINGLETON, District Judge.

Memorandum and Order:

These cases involve the question of facially neutral seniority systems and their effect on past discrimination in employment.

These two cases alleging racial discrimination in employment were consolidated and tried before the court. Plaintiff Sabala is a Mexican American who works in Houston, Texas, for defendant Western Gillette, Inc., a nationwide trucking firm, and brings his suit as a class action. Plaintiff Ramirez is also a Mexican American who currently works for Western Gillette, Inc., in Salt Lake City but who worked in Houston during the period in question. He brings his suit individually.

The defendants are Western Gillette, Inc., and three union organizations. These unions are International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Southern Conference of Teamsters, and Local 988, Teamster, Freight, Tank Line and Automobile Industry. Local 988 is the collective bargaining representative for the truck drivers at the Western Gillette terminal in Houston, Texas, and it is a member of both the Southern Conference of Teamsters and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Against all the defendants Sabala and Ramirez and the class plaintiffs have filed suit under 42 U.S.C. § 2000e et seq. (the Civil Rights Act of 1964) and 42 U.S.C. § 1981 (the Civil Rights Act of 1866). They allege basically two causes of action. In each cause plaintiff Sabala, both on his own behalf and as representative of a class pursuant to Fed.R.Civ.P. 23(b)(2), seeks a declaratory judgment, injunctive relief, damages, and attorneys' fees. By an order entered before trial, this court defined the class of persons plaintiff Sabala is entitled to represent as follows: "All Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." Plaintiff Sabala in the first cause of action has alleged that defendants Western Gillette, Inc. [hereinafter referred to as "Employer" or "Company"], International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [hereinafter referred to as "Inter-

national"] and Southern Conference of Teamsters [hereinafter referred to as "Southern Conference"]. Local Union 988, Teamster Freight, Tank Line and Automobile Industry [hereinafter referred to as "Local"], have entered into collective bargaining agreements which provide for separate seniority for "city" and "road" employees at the Houston terminal, with each class having its own seniority roster. "City" drivers are those who drive principally in Houston and make short runs inside the city limits, whereas "road" drivers make long hauls between different cities. Plaintiffs allege that the conditions imposed on transferring between "city" and "road" are so onerous that the effect is that it is impossible to transfer. It is alleged that the agreements in effect require a city driver to forfeit all "job seniority rights" when he transfers to a road position. In addition, plaintiff alleges, upon transfer from city to line, the driver is placed upon a probationary period during which time he can be discharged. Although there is some dispute as to the truth of this allegation, the court feels that a letter, written to plaintiff Sabala on October 14, 1971, which waived the 30-day probationary period, conclusively establishes the existence of this further burden on transfer from city to line position. The effect, purpose, and intent of the policies and practices pursued by defendants have been and continue to be to limit, segregate, classify, and discriminate against Mexican Americans and Black employees in equal employment opportunities secured to them by the provisions of Title 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Plaintiffs argue that while nondiscriminatory on its face, the bargaining agreements creating separate seniority systems perpetuate and continue past discriminatory practices of the defendants and thus lock in past discrimination.

In the second cause of action, plaintiffs allege that the defendants International, Southern Conference, and the Local have violated their duties of fair representation imposed upon them by the National Labor Relations Act, 29 U.S.C.A. § 151, in that they have knowingly acquiesced, joined, or conspired in

the allegedly unlawful discriminatory practices and policies complained of and have failed to protect Black and Mexican American employees of defendant Employer from said alleged discriminatory policies and practices.

Plaintiff Ramirez basically has the same cause of action as Sabala and the class. Therefore, his case was consolidated with that of the class, and this court's findings with respect to the class apply to plaintiff Ramirez also.

The trial was ordered bifurcated by this court and this opinion will deal basically with the questions of jurisdiction and liability with some discussion of remedy. Pursuant to the findings as to these two issues, there will be another hearing as to the question of specific remedy and damages, if any.

THE CLASS MAINTAINABLE

[1] As stated earlier, this court before trial had ruled that a class action was maintainable. Fed.R.Civ.P. 23 provides that an order authorizing a class action may be amended or redefined at any time before a decision on the merits. This court, however, declines to amend its order authorizing the class action previously stated. There is little question that the requirements of rule 23(b)(2) have been met. Rule 23(b)(2) is the normal vehicle for civil rights class actions and the allegations and evidence that the defendants have acted on grounds generally applicable to the class thereby making appropriate injunctive relief with respect to the class as a whole demonstrate this suit easily falls within the rule 23(b)(2) class structure. Defendants basically argue that three prerequisites of rule 23(a) are not met. First, they argue that the class is not so numerous as to make joinder of the individual plaintiffs impracticable. This is a requirement of a class action under rule 23(a)(1) but the court reaffirms its earlier rulings that joinder of all members is im-

practical. As earlier stated, the class plaintiff is allowed to represent is as follows: "All Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." The total number of potential class members under this court's definition was thirty-nine. Of that number, one has been eliminated by termination of his employment, and approximately twelve have opted out of the class. Thus, there are twenty-six members of the class. This court holds that this number is great enough along with other factors such as the expediency of the joinder of all the potential plaintiffs, the inconvenience of trying individual suits, and the ability of the individual litigants to institute an action on their own behalf. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (D.C.Pa.1968).

[2, 3] Secondly, defendants argue that a class action is not appropriate in this case because each member of the class will need to show individual evidence of discrimination and injury therefrom and, therefore, in effect there are no common questions of law or of fact. This court rejects this contention. The suits to enjoin racial discrimination in employment are by their nature appropriate for class actions. Wright & Miller, Federal Practice and Procedure § 1776. Here, even though some relief might need to be fashioned individually, the common questions of law and fact as to whether there was discrimination as to the class of Mexican Americans and Blacks is enough to satisfy the requirements of rule 23. See Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[4] Finally, the Local raises one other problem as to the maintenance of a class action. It argues that Mexican Americans cannot sue under § 1981 and plaintiff Sabala cannot adequately represent a class under § 1981. This court has already held that § 1981 protects aliens from discrimination. Guerra v.

Manchester Terminal Corp., 350 F.Supp. 529 (S.D.Tex.1972). This same reasoning would apply to Mexican Americans who are discriminated against on the basis of their ethnic heritage. In any event, in this court's pretrial order the parties stipulated as to jurisdiction under § 1981. This court holds that plaintiff Sabala can adequately represent the class of both Mexican Americans and Blacks and declines to modify its original order.

[5] At trial, plaintiffs suggested that the class should be broadened to include minority teamster employees employed by Western Gillette in the entire Southern Conference. This court declines to broaden the class from the class previously defined. Even though the evidence shows discrimination against defendant Company's Houston minority employees with respect to transfer to other southwest area terminals, the issue of whether there was discrimination against defendant's employees in other terminals is not before this court. This court without notice to unions and employees at other terminals will not expand the class beyond the limits all parties acted under in their trial preparation and presentation of evidence. Thus, the class and the relief are restricted to minority employees who are or were at the Houston terminal.

JURISDICTION

Before reaching the questions of liability and remedy, this court must first discuss the question of jurisdiction. Plaintiffs have sued two sets of defendants: (1) the defendant Western Gillette Company, Inc., and (2) the defendant unions. Jurisdiction over the defendant Company is alleged under 42 U.S.C. § 2000e and 42 U.S.C. § 1981. 42 U.S.C. § 2000e-2(a)(1) reads as follows:

> "It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 1981 reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981 prohibits private racial discrimination in employment by both employers and labor unions. Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970). It is clear that jurisdiction over the defendant Company is validly alleged under both of these provisions. Jurisdiction over the defendant unions is alleged under these two provisions and, in addition, under 29 U.S.C. § 151 et seq. and the concept of unions duty of fair representation.

[6] The unions agree that this court has jurisdiction under § 1981 and under the duty of fair representation but attacks this court's jurisdiction under 42 U.S.C. § 2000e et seq. on the

grounds that plaintiff failed to file a charge against the defendant unions with the Equal Employment Opportunity Commission. This point is a valid one and this court holds that there is no jurisdiction against the unions under 42 U.S.C. § 2000e. The case of Miller v. International Paper Company, 408 F.2d 283 (5th Cir. 1969) is directly in point. That case held that an employee may not bring suit against a union under Title VII unless the union has first been charged in a complaint brought by the plaintiff before the EEOC.

LIABILITY

Having disposed of the jurisdictional issues involved, this court may now reach the merits of plaintiffs' case. The evidence at trial basically is as follows. The drivers of Western Gillette, as is true of most drivers throughout the country, are divided into two main classifications. The first classification is for drivers who basically drive short hauls in the city [hereinafter referred to as "city drivers"]. The second classification is for drivers who make long hauls between cities [hereinafter called either "road" or "line drivers"]. At least in the southern United States, generally road drivers have been predominately white. It was testified to and this court finds as credible that one main reason for this was that minority drivers were not able to find accommodations along the road in many southern states. Historically, road drivers have earned more than city drivers and road driving has been considered a more lucrative position than city driving. This situation is changing because the road drivers' pay has not increased at as great a rate as the pay of city drivers. Other than that, the principal difference between road and city driving is that in city driving you are able to live at home but you must be able to maneuver a truck in city traffic and in tight situations. Road drivers, on the other hand, have more freedom and do not have to have the skills in maneuvering a truck intricately that city drivers have but must remain many hours away from home.

Plaintiffs are drivers of Western Gillette and allege that Western Gillette and the unions have discriminated against them. Plaintiffs use a two-pronged theory to show discrimination. First, plaintiffs' claim that minority drivers were overtly discriminated against in hiring and transferring to road driving positions. Secondly, they allege that the seniority provisions applicable to transferring from one driving classification to another, although on their face applying equally to white and minority drivers, have the effect of "locking in" this past discrimination. These seniority provisions, agreed to between union and Company representatives as part of the collective bargaining agreement and the practices pursuant to this agreement, will be more fully explained later. Basically, however, they provide that if a driver transfers to a new classification he retains his seniority date with respect to when he hired on with the Company (e.g., for pension purposes) but must begin as a new man with respect to his seniority in competing with other men for driving assignments in his new classification.

[7] This court finds that members of the class and plaintiff Ramirez have been discriminated against in transferring to road positions with Western Gillette. This conclusion is based upon direct evidence of overt discrimination by Western Gillette as well as by statistical evidence.

Plaintiff Ramirez began employment for Western Gillette in August of 1966 as a city driver. It was testified to that a short while thereafter, in approximately October 1966, he sought to transfer to line employment. He was discouraged from seeking to transfer and when he later persisted to seek to transfer was told that he would have to quit his job as a city driver and then submit an application for the line and that there was no line position open at that time.

Plaintiff George Williams, a city driver for Western Gillette since 1954 with 17 years previous experience as a road driver,

testified he was told in 1958 by the Company's terminal manager that "there was no such thing as Negro road drivers for Western Gillette." In 1964, after hearing about the Civil Rights Act, this plaintiff again asked the Company's terminal manager about road jobs. The then terminal manager walked off. In 1965, he asked the terminal manager, who told him that he would lose his seniority and nine times out of ten lose his job. As a result of this advice, plaintiff Williams, in his capacity as job steward, told other minority city drivers who asked him about the possibility of their obtaining road positions that they might lose their jobs. He further testified that he understood from the Company that upon transfer a new road employee would be subject to the 30-day probationary period in which he could lose his job.

Plaintiff Luther Thomas testified that he asked the terminal manager about the possibility of a road job but was advised that he would lose all of his seniority to which he replied that he would still like to try for the job but was not given an application.

Plaintiff Alfonso Adams testified that the Company's operations manager in Houston told him that he would have to resign his city job first and then go home, and the operations manager would consider giving him a road job. Adams testified that the operations manager told him, "You'll have to quit and start all over again like a new employee."

Plaintiff Oliver Sabala testified that he asked supervisory personnel at the Company in 1967 for road work but was told by the supervisory personnel that he might get them both run off from the Company if he pushed for it. Sabala further testified that this supervisory person said that the Company did not hire "his" people on the road. In November 1968, Sabala went on the board as a regular city employee. Thereafter he testified that he continually inquired about road jobs of the road dispatcher and was regularly turned down.

Evidence was submitted that the Company kept records of the race of its drivers at its headquarters at least as to plaintiff Alfonso Adams, on his 1963 employment application; as to plaintiff Leonard Ramirez, on his post-1965 employment application and on its seniority list of road drivers as of August 26, 1971, which was distributed to its terminal manager in Van Horn, Texas, which list was not used for EEOC reporting purposes.

In addition, and perhaps more importantly, the statistics of Western Gillette and its Houston terminal indicate that there has been discrimination. The Houston terminal of Western Gillette is in the Company's "southwest area" although it is in the "Southern Conference" of the Teamsters Union. The southwest area currently consists of terminals at Houston, Texas, Van Horn, Texas, Dallas, Texas, Oklahoma City, Oklahoma, and Memphis, Tennessee. The evidence in this case demonstrated that there were 127 line drivers working for Western Gillette in the Southern Conference in 1965. At the present time there are 125 line drivers employed in the Southern Conference; 77 have been hired as new employees since 1965, all White. Two Blacks work as line drivers in the Southern Conference, however, neither of them is a new hire. Dan Haggerty transferred from Miami, Oklahoma, to the road in Dallas, Texas, in December 1968, and George Williams transferred from city delivery work in Memphis to line work in Memphis in 1971. There is one Mexican American line driver, Ortis, who transferred into the Southern Conference in 1960 after being hired in Los Angeles in 1955. He continues to work as a line driver out of Houston although he is presently physically incapacitated. As far as the Houston terminal is concerned, Western Gillette has approximately 29 drivers. Of these currently only one is Mexican American and there are no Blacks. The composition of the city drivers in Houston, however, is radically different. The 11 drivers hired during or prior to 1956 are all Blacks. Of the 54 drivers hired during and since 1957, 23 are White, 25 are Black, and 6 are Mexican American.

These statistics demonstrate a pattern of discrimination against minority road drivers at Houston by Western Gillette. Of the 29 road drivers at Houston, only one is of a minority group. Of the 65 city drivers at Houston, 42, well over half, are either Black or Mexican American. "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts." Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (5th Cir., 1970). Defendants argue that since some minority drivers have now or have in the past been road drivers at Houston or for other southwest area terminals, the statistics do not indicate discrimination. Defendants in effect contend that statistics cannot show discrimination unless there is one hundred percent discrimination. This court cannot accept this theory. Both under the Civil Rights Act of 1964 and under § 1981 tokenism cannot be countenanced. These statistics and evidence presented at trial indicate that there has been discrimination. The fact that this discrimination is somewhat subtle in that there is not one hundred percent discrimination does not make this fact any less invidious.

Plaintiffs allege this discrimination is a result of past discrimination on hiring and on transfers and that the statistics demonstrate this discrimination is locked in by the present seniority system in effect at Western Gillette's Houston terminal. As noted earlier, there are two classifications for drivers at Western Gillette at its Houston terminal—road and city. These two classifications each have their own seniority system. When a driver joins Western Gillette, he is accorded certain rights, such as date for his pension, on the basis of his seniority. This is called "company seniority." Although there is testimony to the contrary, this court finds that a driver keeps his company seniority when transferring from road to city or vice versa. But there is a second type of seniority called "job seniority." Each driver has job seniority from the time he became a driver in the classification in question. Job seniority is the seniority

which is used for bidding for the most sought-after trips. A driver with the highest job seniority is the last person to be laid off and is the one who gets his choice of assignments within his classification. If a driver transfers from one classification to another he retains his company seniority but loses his job seniority. In other words, if a driver joins Western Gillette in 1965 as a city driver and transfers to a road position in 1970, the date of his company seniority is from 1965 but he must begin again from 1970 with respect to his job seniority as a road driver. Obviously this dual system of seniority acts as a deterrent to transfer from one classification to the other and plaintiffs allege that this has the effect of perpetuating past discrimination against minority employees becoming road drivers.

The two leading cases in this area of locked-in discrimination are Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971) and Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970). In *Bing*, Roadway Express had a policy that if an employee transferred from city to road he must resign his position and thereby forfeit all employment rights. He must then apply for the new position as if he were a stranger, with no assurance prior to resigning his job that he would be hired for the new position. In *Jones*, there was also a no-transfer policy between city and road position.

[8] In those cases, the respective courts held the effect of the facially-neutral policy against transfer was to lock in past discrimination and the result was that minority drivers were denied access to road positions. In *Bing* the Fifth Circuit points out the fact that just because the seniority system and transfer limitations apply equally to White and minority drivers is no justification if the result is that it locks in past discrimination:

> "In defense of the policy Roadway argues that the rule has been applied equally to both black and white employees and has prohibited transfers from the road driver unit

> to the city driver unit as well as from the city unit to the road unit. True though this may be, it is not a satisfactory answer to Bing's contention that in actual effect the facially neutral policy is discriminatory. Those white drivers who were employed as city drivers presumably had the opportunity to apply as road drivers but either were not qualified or preferred city work. Unlike Bing, the white drivers were not barred from the position of road driver by virtue of their race. Consequently, though the no-transfer policy may serve to keep all drivers in their present positions, the discriminatory hiring practices in effect at the time Bing was employed colors the policy, when applied to Bing and members of his class, with a distinctively discriminatory tint." Bing v. Roadway Express, Inc., 444 F.2d 687 at 690.

Defendants argue that the instant case is different from *Bing* and *Jones* in that in *Bing* and *Jones* there was either a no-transfer policy or what in effect is the same thing in that if an employee transferred from city to road he had to start over as a new employee. In our case, so defendants' argument goes, the employee only loses his job seniority and he keeps his company seniority and is not treated as a stranger to the company. This is clearly a distinction between the instant case and *Bing* and *Jones* and, apparently, this problem of how far the concept of locked-in discrimination reaches is one of first impression before the federal courts. Further, in *Bing* and *Jones* there were no minority drivers who were road drivers unlike the present case where there are some. But even though the facts are different, this court holds the result is the same: discrimination. This court repeats what it said earlier, just because the discrimination is more subtle than in *Bing* and *Jones* does not make it any less invidious. The dual seniority system here as in *Bing* and *Jones* locks in past discrimination because it discourages to a large extent minority employees from transferring from city to road.

[9] Defendants further argue that there can be no discrimination in road employment if there are no openings in road em-

ployment. Defendants have presented evidence that Western Gillette's business at the Houston terminal has declined and there have been in the last few years always some road drivers laid off. Thus, defendant argues that the reason minority members have not been able to transfer to road positions is because there were no positions available. But the fact is that there were new road drivers during the period in question and that "casuals" have forced on to become road drivers. A casual is someone who is hired by the Company to work temporarily during periods of high volume. Under the bargaining agreements between Company and unions and the interpretations of these bargaining agreements a casual road driver (other than a regular driver on layoff working as a casual) can force an employer to take him on as a regular employee if he has work and has made himself available for work for a continuous period of thirty-one days. During the period from 1968 to 1971, there were seven men who forced on at Houston as line drivers. Defendant Western Gillette argues that this does not indicate there were positions available for these drivers during this period but only that the terminal manager was lax in his work assignments and inadvertently let casuals work enough hours to force on when there were not positions for them. The Company's lack of intent may be correct. However, seven men were hired from 1968 to 1971 as road employees none of whom were minority drivers. This court, therefore, holds that there were positions available during this period. Even if there were no positions available, this court would still not countenance discrimination. Neither Company nor unions can have a dual seniority system that locks in past discriminations even if there happens to be no positions available at the time. This is because this court holds that should a position become available minority employees would be automatically discriminated against in obtaining this position because of the discriminatory dual seniority system.

[10] Western Gillette as proof of its sincerity as being against discrimination points to a campaign in 1968 to hire minority

drivers as road drivers throughout its operations in the United States. In an effort to recruit road drivers at Chicago and at Miami, Oklahoma, advertisements were placed in Chicago and direct contact was made with minority groups both there, here, and in Los Angeles. However, as far as this court can determine the Company did not do anything more in Houston other than offer these road openings to the one Black union steward. Laudable efforts and sincere statements by Company officials do not alter the fact that there was past discrimination and that the dual seniority system although facially neutral has the effect of locking in this past discrimination. Present good faith on the part of the Company and the unions has little relevance to the difficult question of facially neutral but in fact discriminating seniority systems.

[11, 12] Having determined that the employer has discriminated in the past and that the present policy of the dual seniority system perpetuates the past discrimination, the next issue is whether the present policy is justified by showing a business necessity. "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." Local 189, United Papermak & Paperwork v. United States, 416 F.2d 980 at 989 (5th Cir. 1969). If there is an overriding legitimate nonracial business purpose, this is a defense under a § 2000e suit. However, the evidence in this case does not indicate any such legitimate, nonracial business purpose that would justify what this court has found to be racial discrimination on the hiring and transfer practices of Western Gillette as they relate to the city and road drivers. It is clear to the court that the discrimination as found by the court is and was practiced both by the Company and by the unions within the aegis of § 1981.

[13-16] The limits of § 1981 suits against labor unions have not been fully defined by the courts yet. However, at least one

court has held that acquiescence in "locked-in" discrimination by a local union is a violation of the § 1981 prohibition against discrimination in the right to contract. Johnson v. Goodyear Tire and Rubber Co., 349 F.Supp. 3 (S.D.Tex.1972). This surely should so—the local union which signed the agreements providing for separate seniority rosters and which is the agent of its employees has a duty to protect its members against discrimination. This court also holds the Southern Conference and the International violated § 1981. Officials of these two organizations were intricately involved in the contract negotiations that led to the agreements in question. See Eagers v. Yellow Freight System, Inc., 4 F.E.P. Cases 1297 (N.D.Ga. No. 14510, July 21, 1972). The negotiations for the agreements are conducted on a nationwide and regionwide basis between committees made up of Southern Conference and International officials, and the local actually has little to do with the formulation of the agreements other than the formality of signing it. The International and Southern Conference argues, however, that the agreements providing for dual seniority are not on their face discriminatory and they had no notice that there was discrimination at the Houston terminal. This is not enough of an answer. These union organizations have a duty under § 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. Unions under § 1981 have an affirmative obligation to protect members from illegal discrimination. This duty includes the responsibility to determine if the agreements they help negotiate lock in any such past discrimination.

REMEDY

[17] Having determined that Black and Mexican American employees of Western Gillette at its Houston terminal were discriminated againt, both under the Civil Rights Act of 1964 and

the Civil Rights Act of 1866, this court must now determine the remedy to be given these aggrieved plaintiffs. The question of remedy is a complex one because of the conflicting interests of plaintiffs and the various defendants as well as the many employees that will be affected by this court's order. This court must first deal with the question of the dual seniority system. This dual seniority system has locked in past discrimination against minority groups at the Houston terminal. But this court feels that it would be too drastic a remedy to completely merge the two seniority systems. Such a remedy would have various major shortcomings. It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs. Top seniority city drivers who could not meet traffic skills and the driving skills required of them would be able to bump into the most attractive road positions. This court is persuaded that doing away with the dual seniority system entirely and having only one seniority roster would, therefore, create chaos and be detrimental to both minority and non-minority employees as well as the Company. In questions of this kind, the court must tread softly and must fashion a remedy which has the least destructive effects on both Company's and employees' desires while at the same time obviating the effects of past discrimination.

[18] As suggested by plaintiff in his Post Trial Memorandum, the following changes will be ordered to be placed into effect:

1. As to the class previously defined who evidence a desire to accept road employment at any Western Gillette terminal in the Southern Conference, the Company is ordered to avail

such persons the opportunity to transfer, with seniority dating to the date they would otherwise have sought road employment but for the discriminatory practices, but in no event will such seniority date be earlier than July 2, 1965. As to such transfers, the union defendants are enjoined to not oppose their effectuation.

2. Any individual who transfers pursuant to 1, above, and whose date of employment as a city driver is earlier than his new seniority date on the road, shall have his accumulated city seniority frozen, and at any time after six months as a road driver, shall be able to return to a city position with such accumulated city seniority.

3. As to future operations of the Company, after the effective date of this relief, all employees of the Company shall be entitled to move freely from city to road and from road to city. Upon such transfer, the transferee shall go to the bottom of the roster of the classification to which he is transferring, but he shall retain his accumulated seniority in the classification from which he has transferred. If, after six (6) months, the person desires to return to his former classification, he may do so on the basis of his frozen accumulated seniority rights in such former classification.

4. Those persons who have previously transferred from city to road or from road to city, and who, in so doing, lost their accumulated seniority in their former classifications, shall have such lost accumulated seniority restored for the purpose of exercising their seniority rights should they, in the future, desire to return to their former classification.

5. Any person who requests to be transferred either from city to road or from road to city must meet all reasonable qualifications relating to his ability to perform the job to which he requests a transfer.

6. As to all of the above, the Company is ordered to implement the necessary changes, and the union is enjoined from opposing such implementation.

This court feels that the above remedy would be the most appropriate means to destroy the effects of past discrimination on members of the class. The reason class members who were discriminated against may transfer to any terminal in the southwest area and not just the Houston terminal is that the evidence shows that Houston city drivers were discriminated against in transferring to road positions at the Houston terminal. The full dual seniority system remains in effect for nonminority city drivers since this is what the employer and employees desire as evidenced by their actual practice and their collective bargaining agreements.

[19-21] This court orders the Company and the unions to implement the above remedy and enjoins both the Company and the unions from interfering with these changes or with the rights of members of the class to act pursuant to this relief. The plaintiffs also seek monetary damages, basically in the form of back pay. This is a rule 23(b)(2) class action which is used when the representatives of the class are seeking final injunctive relief or corresponding declaratory relief. It is used when the relief sought is primarily injunctive or declaratory relief. However, it is also permissible in a rule 23(b)(2) class action to seek and obtain back pay as part of the injunctive relief needed to obviate past discrimination. See Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (5th Cir. 1969); Robinson v. Lorillord Corp., 444 F.2d 791 (4th Cir. 1971); Wright & Miller, Federal Practice and Procedure § 1775. This court holds that members of a class who would have transferred to road positions or who would have hired on as road positions absent discrimination are entitled to back pay equaling the difference between the salary they did receive and the salary they would have received absent discrimination. The second half of this

bifurcated trial will be held on the question of implementing the court's remedy and on the question of back pay damages and attorneys' fees and evidence will be presented on these issues at that time. This court holds that any difference in pay will be paid to the members of the class by the defendant Company. The Company maintains that it is not liable for the dual seniority system. However, the Company, in its collective bargaining agreements with the unions agreed to accept the principle of seniority under the different contracts as a basis for assignments of work for its employees. At the very least the Company knew of the dual seniority system and accepted it. Further and more importantly, the testimony of witnesses and the statistical evidence show that the Company discriminated against members of the class who desired to become road drivers. The Company may not evade its burden of having to pay to rectify this discrimination by saying the seniority system is the unions' responsibility alone.

[22] The question of attorneys' fees involves an allocation of responsibility for this discrimination among the various defendants. The 1964 Civil Rights Act provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs. 42 U.S.C.A. § 2000a-3(b). The Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees. Jinks v. Mays, 464 F.2d 1223 (5th Cir. 1972). All defendants argue that they have no responsibility for the discrimination. As noted earlier this court holds that the primary responsibility for the discrimination against the class is the Company's since the Company is the one that practiced overt discrimination in transferring which resulted in locked-in discrimination of the dual seniority system. Both the International and the Southern Conference, on the one hand, and the Local, on the other hand, argue that because of the collective bargaining structure they have nothing to do with any discrimination. The unions' attempts to wash their hands of the dis-

crimination must fail. As far as the Local is concerned, it acquiesced in the discrimination practiced against its members. Further, the Local gave a written power of attorney to a bargaining committee representing the Southern Conference of Teamsters (the National Teamster Union is divided into various regional conferences, one of which is the Southern Conference) which negotiated the contract. The bargaining agreement authorizing this seniority system was signed by the Local and also negotiated by an agent of the union and, therefore, the Local is responsible for it. International and Southern Conference argue that any discrimination is a matter between the Company and the Local. These unions argue that neither International nor Southern Conference was a bargaining agent of the Local. To understand this contention reference must be made to the manner in which collective bargaining arguments are reached. The basic nationwide contract between the Teamsters Union and employers throughout the country is the National Master Freight Agreement. This is negotiated by committees representing local unions and various employers. Incorporated into the National Master Freight Agreements are various supplemental agreements entered into between negotiating committees for the Teamsters locals in the conference in question and committees for the employers in the conference. These supplemental agreements affecting the class in this suit are the Over-the-road Supplemental Agreement and the Local Freight Forwarding Supplemental Agreement for the Southern Conference and they are signed by the local union. Even though in theory perhaps neither the Southern Conference nor International are part of the agreements, in practice the negotiating committee is made up of International and Southern Conference officials at least in part responsible for its outcome. As this court said earlier, all union organizations violated their duty under § 1981 to protect the class from discrimination. Therefore, this court allocates attorneys' fees as follows: one-half to be paid by the Company, the other one-half to be paid equally by the three union organizations.

[23-25] Plaintiffs have also sued defendant unions alleging a breach of duty of fair representation under 29 U.S.C. § 151. The landmark case on the duty of fair representation is Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). This case held that a bargaining representative of employees has a duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele v. Louisville & Nashville R.R. Co., *supra* at 202, 203, 65 S.Ct. at 232, 89 L.Ed. at 183. This court holds that there has been no breach of duty of fair representation by any of the union defendants. The unions have acquiesced in a seniority system that perpetuates past discrimination but that does not give rise to a breach of their duty of fair representation. To breach this duty there must be evidence that the unions acted unfairly or unimpartially or not in good faith or with hostile discrimination. Richardson v. Texas & New Orleans R.R. Co., 242 F.2d 230 (5th Cir. 1957).

To sum up, the class plaintiff Sabala may represent is all Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas. Plaintiff Sabala and the class he represents and plaintiff Ramirez have proven discrimination against the defendant Employer under § 1981 and § 2000e and against the defendants Local, Southern Conference, and International under § 1981. Both Company and unions are to some extent responsible for this discrimination although the Company has the greater burden of responsibility. Plaintiffs have not shown a breach of the duty of fair representation by any of the defendant unions. This court enjoins all defendants from continuing the discriminatory practices discussed herein and orders the parties to change the seniority system in accord with this opinion. This court recognizes that the parties are far better equipped than this court to formulate a judgment in accord with this opinion that disrupts to as small an extent as possible the practices and agreements of the unions and the Company.

The clerk will notify counsel when the hearing on remedy and damages will be set and at that time counsel are to present evidence as to how best to implement this court's order. Counsel will submit an order, or orders if counsel cannot agree, in accordance with this opinion at that time.

APPENDIX B

In the United States District Court for the Southern District of Texas, Houston Division

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated

v.

Western Gillette, Inc., et al.

Civil Action No. 71-H-961

Leonard M. Ramirez

v.

Western Gillette, Inc., et al.

Civil Action No. 71-H-1338

MEMORANDUM AND OPINION

(Filed February 26, 1974)

The trial of these cases involving the question of racial discrimination in employment practices was bifurcated and an order concerning jurisdiction and liability entered July 17, 1973, published at 362 F.Supp. 1142. The hearing on remedies, damages, and costs was held during October and November of 1973. This supplemental Memorandum and Opinion will treat those subjects only. In the areas of remedies, damages, and costs, this Memorandum and Opinion has enlarged upon that of July 17, 1973, and in those areas will supersede the earlier opinion when inconsistencies arise.

Remedy

Having determined that Black and Mexican American employees of Western Gillette at its Houston terminal were discriminated againt, both under the Civil Rights Act of 1964 and the Civil Rights Act of 1866, this court must now determine the remedy to be given these aggrieved plaintiffs. The question of remedy is a complex one because of the conflicting interests of plaintiffs and the various defendants as well as the many employees that will be affected by this court's order. This court must first deal with the question of the dual seniority system. The dual seniority system has locked in past discrimination against minority groups at the Houston terminal. But this court feels that it would be too drastic a remedy to completely merge the two seniority systems. Such a remedy would have various major shortcomings. It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs. Top seniority city drivers who could not meet traffic skills and the driving skills required of them would be able to bump into the most attractive road positions. This court is persuaded that doing away with the dual seniority system entirely and having only one seniority roster would, therefore, create chaos and be detrimental to both minority and nonminority employees as well as the Company. In questions of this kind, the court must tread softly and must fashion a remedy which has the least destructive effects on both Company's and employees' desires while at the same time obviating the effects of past discrimination.

This court intends by its order to afford the class members an opportunity to transfer to over-the-road positions heretofore denied them either by outright discrimination or by virtue of their having been "locked in" as a result of their collective bargaining agreement. Such relief must be broad enough to insure that the transferring discriminatee is able to keep his over-the-road position once he obtains it. Consequently, all transferring discriminatees will carry over with them their "rightful place" seniority date. "Rightful place" seniority represents the earliest opportunity following his qualification at which any discriminatee could have been hired as a road driver. *Bing v. Broadway Express, Inc., et al.*, 5th Cir., October 15, 1973, No. 72-2565. The testimony at trial and the evidence established that of the qualified class members ten would have accepted over-the-road employment anywhere in the Southern Conference and thirteen of the qualified class members limited themselves to over-the-road employment at the Houston terminal. Further, there were over-the-road jobs available in the Southern Conference and in Houston to which the discriminatees would have acceded absent discrimination. Predicated on the foregoing, those discriminatees who would have accepted over-the-road employment anywhere in the Southern Conference (herein called "Southern Conference Discriminatees") have been assigned "rightful place" seniority dates predicated upon the job next available anywhere in the Southern Conference after the date upon which such Southern Conference Discriminatee was qualified to drive over-the-road. As to those discriminatees who limited themselves to over-the-road employment in Houston, Texas (hereinafter referred to as "Houston Discriminatees"), they have been assigned "rightful place" seniority based upon the over-the-road job next available out of the Houston terminal after the date upon which such Houston Discriminatee became qualified to drive over-the-road.

A roster of all discriminatees entitled to relief under this Order is herein set forth reflecting the name of the discrimina-

tee, whether he be a Southern Conference Discriminatee (SC) or a Houston Discriminatee (H), and his "right place" seniority date. Such seniority dates shall be as of 11:59 p.m. on the date designated.

Name	"Rightful Place" Seniority
Raymond O'Neal (SC)	5/31/56
George Williams (H)	1/18/60
Luther Thomas (H)	2/10/63
Alfonso Adams (SC)	6/18/64
Thomas Lindley (SC)	6/20/64
I. V. Phlegm (H)	8/27/64
Frank Fountain (H)	5/03/65
Essie McGregor (H)	5/10/65
Herman Carrier (H)	8/03/65
John Roberson (SC)	9/01/65
Roy Rodrigues (SC)	6/09/66
Henry McTear (SC)	10/11/66
Leonard Ramirez (SC)	5/02/68
Oliver Sabala (SC)	6/18/68
Lewis Norman (H)	4/27/69
Robert Clark (SC)	2/07/69
Charles O'Neil (SC)	2/11/69
Grover Williams (H)	5/01/70
Edgar Williams (H)	6/07/70
Deford Bailey (H)	7/20/71
Charles Lipscomb (H)	7/21/71
Ormogene Dosty (H)	9/01/71
Ellsworth Pinkins (H)	——

Two members of the class previously defined, Frank Golden and Manuel Ellison are eliminated from further consideration for remedial relief or back pay because (a) both responded to defendant Western Gillette's interrogatories that they would not accept road employment either in Houston or in the Southern

Conference, and (b) neither is presently qualified to operate over-the-road equipment.

Jose Fonseca is entitled to no relief in that he has quit his employment and is, therefore, no longer a member of the class as previously defined.

This court finds that discriminatee Frank Fountain was disqualified for employment as an over-the-road driver from July 1, 1972, until June 1, 1973, and, therefore, that any back pay award to the said Frank Fountain will not include an award for the eleven-month period described herein.

This court finds that discriminatee Leonard Ramirez accepted over-the-road employment outside the Southern Conference in August 1972, and, therefore, any back-pay award as to the said Leonard Ramirez shall terminate as of August 1, 1972.

The following changes are hereby ordered to be placed into effect:

1. Within thirty (30) days of this Order, the Company shall inform in writing all class discriminatees whose names appear in the list set forth above of their rights under this Order including the right to transfer to over-the-road driving jobs with "rightful place" seniority carry-over. A copy of such written notice shall be presented to counsel for the class for approval prior to dispatch. The notice shall contain the salient provisions hereinafter set forth in paragraphs 2 through 9.

2. As over-the-road job opportunities occur anywhere in the Southern Conference, such jobs shall be offered to the discriminatees whose names appear above in the order in which their names appear above. The Company is ordered to offer such persons the opportunity to transfer, with "rightful place" seniority dating to the date set forth opposite such men's names. As to Ellsworth Pinkins, his "rightful place" seniority date shall be the date that the first opening occurs in Houston, Texas.

To the extent that the carry-over of "rightful place" seniority violates the National Master Freight Agreement rule on seniority, that rule is suspended because it violates the Civil Rights Act of 1964. Accordingly, the union defendants are enjoined to not oppose the effectuation of the transfers herein ordered.

The practice of casuals "forcing on" as road drivers was referred to in this court's earlier opinion, 362 F.Supp. 1142 at 1152. This practice should be discontinued because it is the opinion of this court that such practice can be utilized to effect a policy of discrimination relating to road-driver positions. However, such a practice is apparently a part of the present bargaining agreement and for that reason this court is reluctant to enjoin future use of such practice. The court suggests that in connection with future negotiations relating to new bargaining agreements the parties should meet this problem. In the meantime, whenever, in the Southern Conference, a person "forces on" the road board, a job vacancy shall be deemed to have occurred, and the Company shall immediately offer a position at such terminal to the next discriminatee entitled to a job opportunity. As to such transfers, union defendants are enjoined to not oppose their effectuation.

3. If any member of the Southern Conference Discriminatees rejects an opportunity to transfer to an over-the-road driver position at any terminal in the Southern Conference, he shall be deemed to have waived his right to transfer under this Order. If a Houston Discriminatee rejects a job offer at a terminal other than in Houston, his name shall be moved to the bottom of the roster set forth above and he will be afforded one more demonstrable opportunity to transfer to a road position in Houston, Texas, if and when an over-the-road vacancy occurs there.

4. Any discriminatee who transfers to an over-the-road driving job pursuant to this Order or who may have previously transferred (*e.g.*, Leonard Ramirez) shall carry his "rightful

place" seniority for all bidding purposes and his company seniority for fringe-benefit purposes. Each transferring discriminatee shall be slotted into the over-the-road seniority roster at the terminal to which he transfers based upon his "rightful place" seniority so that he may establish his "rightful place" on such roster.

5. Any discriminatee who transfers to an over-the-road position pursuant to this Order shall have a 180-day "retreat" period during which he shall have the right to return to his old job without loss of seniority if he does not wish to continue as an over-the-road driver. Such a return shall be considered a rejection within the meaning of paragraph 3; provided, however, that any discriminatee may waive, in writing, his "retreat" right and by so waiving that right forfeits the privilege of returning to his former job classification with his seniority intact.

6. After each discriminatee has had one demonstrable opportunity to accept or reject over-the-road employment at any terminal in the Southern Conference, and after each Houston Discriminatee, regardless of whether he rejects an opportunity other than at Houston, has had one demonstrable opportunity to accept or reject any over-the-road position at Houston, Texas, as per paragraph 3, above, the operative provisions of this Order shall terminate. However, the Company is admonished that it should seek henceforth to promote, on a nondiscriminatory basis, from within in the future.

7. Defendant International shall designate one International union official who shall be responsible for compliance with this Order. The International shall give counsel for plaintiff his name within thirty days of this Order. Such individual shall inform all affiliated local unions which represent Western Gillette, Inc., employees of the requirements of this Order and advise them of the necessity of compliance therewith.

8. As to all of the above, the Company is ordered to implement the necessary changes, and the union is enjoined from opposing such implementation.

9. This court shall retain jurisdiction for the purpose of resolving any controversy or problem which may arise in the implementation of this Order which cannot be satisfactorily resolved through normal grievance procedures.

This court feels that the above remedy would be the most appropriate means to destroy the effects of past discrimination on members of the class. The reasons that class members who were discriminated against may transfer to any terminal in the Southern Conference and not just the Houston terminal are that the evidence shows:

(a) That "Modified System Seniority" affords over-the-road drivers the opportunity to "bump" from terminal to terminal in the Southern Conference when they are on layoff;

(b) That at least ten men demonstrated to the satisfaction of the court that they were in the past and continue to be willing to accept over-the-road employment at any terminal in the Southern Conference; and

(c) That the Company freely moves road drivers from location to location within the Southern Conference under "changes of operation." The full dual seniority system remains in effect for all city drivers whose names do not appear in the roster set forth above since this is what the employer and employees desire as evidenced by their actual practice and their collective bargaining agreements.

Damages and Costs

Damages

The plaintiffs also seek appropriate back pay representing the monies they would have earned had they been over-the-road

drivers. This is a Rule 23(b)(2) class action which is used when the representatives of the class are seeking final injunctive relief or corresponding declaratory relief. It is used when the relief sought is primarly injunctive or declaratory relief. However, it is also permissible in a Rule 23(b)(2) class action to seek and obtain back pay as part of the injunctive relief needed to obviate past discrimination. See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Robinson v. Lorillord Corp.*, 444 F.2d 791 (4th Cir. 1971); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1775. It is clearly in the discretion of the court, once having found intentional unlawful employment practices, to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party responsible for the unlawful employment practices pay to the class members back pay calculated to restore such class members to their rightful economic place. The discretionary authority vested in this court is found in 42 U.S.C. 2000e-5(g), and supported by the Fifth Circuit: "The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion. . . ." *Johnson v. Georgia Highway Express, Inc., supra.*

This court holds that members of the class previously described are entitled to back pay equaling the difference between the salary they did receive as city drivers and the salary they would have received as over-the-road drivers absent discrimination. The court finds that it is not necessary as a prerequisite of an award of back pay to a class plaintiff that such class plaintiff had to apply for a position and be denied a position for discriminatory reasons at a time a position was available. Accordingly, the court concludes, as a matter of law, that proof of discrimination against an individual member of the class is not a prerequisite to an award of back pay to that individual member of the class. See *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). No back pay shall be computed

for time after July 17, 1973, when this court by its prior Memorandum and Order ordered that the discriminatory practices be terminated.

This court has found that a reasonably prudent over-the-road driver for Western Gillette, Inc., expends approximately 10% of his gross annual pay in connection with his employment as an over-the-road driver, consequently, as to any back pay determined to be due any discriminatee herein, such amount otherwise determined due such discriminatee shall be reduced by an amount equal to 10% of such amount. This court has heard testimony from all discriminatees with regard to "interim earnings," and finds that the evidence adduced is not sufficiently definite to show that such "interim" or "moonlight" earnings were of the type that such discriminatees could not have earned had they been employed as over-the-road drivers. In connection with such earnings, counsel for the class has agreed to furnish counsel for the Company all discriminatees' earnings data for the years 1968 through 1973, and counsel for the class is ordered to do so as a condition precedent to the payment of any back pay to any discriminatee. The court will retain jurisdiction to resolve disputes concerning the matters of "interim" or "moonlight" earnings insofar as such earnings might operate to reduce the amounts of back pay due each discriminatee. Finally, no discriminatee shall be paid any monies due him under this Order until such discriminatee shall have accepted an over-the-road job and remained in such job beyond the 180-day "retreat" period unless such discriminatee waives such "retreat" period in writing in which case he shall be paid at the time of such waiver, provided, however, if all discriminatees are not afforded one demonstrable opportunity at over-the-road employment within a period of one year of the date of this Order, the court will reconvene counsel for the purposes of ascertaining the reasons therefor and ordering such further affirmative action, if any, which may be necessary to implement this court's Order.

In this second half of the bifurcated trial, substantial expert testimony and supporting data was offered by both counsel for plaintiffs and counsel for the Company with regard to the matter of determining the difference in what a discriminatee earned as a city driver and what he would have earned as an over-the-road driver. The matter of computation of back pay for each member of a class of discriminatees, at trial, is a question of first impression. The variety of formulae by which individual back pay due this class of discriminatees can be computed is bewildering; the record of the second part of this bifurcated trial is replete with such formulae. Having carefully considered all of such formulae as were advanced, this court adopts the formula of Dr. Richard A. Tapia which is contained in court's Exhibit 2. By that formula, a reasonably prudent (*i. e.*, representative) road driver and a reasonably prudent (*i. e.*, representative) city driver, each having characteristics representative of their peers with regard to seniority, earnings and work habits were selected. Thereafter, the average monthly earnings of the representative road and city driver for the period embracing June 3, 1968, through July 17, 1973, were compared, and a ratio representing such comparison was derived. In this case it was demonstrated that a representative over-the-road driver earns, on a monthly basis, 1.56 times that which a representative city driver earns. The court while recognizing that the method of damage calculation determined by it contains a statistical disparity and does not measure what the plaintiffs would have earned had they been given the first available opportunity to transfer to a line position, nevertheless, holds that the 1.56 factor is based upon the average road driver earnings as against the average city driver earnings based upon the seniority date of the city driver, and that such factor is to be applied to all plaintiffs. Consequently, in order to find the back pay due a particular discriminatee, such discriminatee's earnings for the period June 3, 1968, through July 17, 1973, or from his "rightful place" seniority date through July 17, 1973, whichever is lesser, must first be determined; that figure should then be multiplied by 1.56; the result of such

multiplication represents the gross earnings he would have made as a road driver. The resulting figure must, of course, be reduced by (a) the expenses incurred in connection with over-the-road employment which are not incurred in connection with city driver employment (in this case, 10%), and (b) any "interim earnings" of a particular discriminatee which he would not have been able to have earned had he been an over-the-road driver, and (c) the actual amount earned as a city driver.

Based on the conditions of accepting over-the-road employment as set forth above, the defendant Company is ordered to pay to the discriminatees the amounts set forth in the court's Final Judgment.

This court holds that the back pay set forth in the Final Judgment will be paid to the qualifying members of the class by the defendant Company. The Company maintains that it is not liable for the dual seniority system. However, the Company in its collective bargaining agreements with the unions agreed to accept the principle of seniority under the different contracts as a basis for assignments of work for its employees. At the very least, the Company knew of the dual seniority system and accepted it. Further and more importantly, the testimony of witnesses and the statistical evidence show that the Company discriminated against members of the class who desired to become road drivers. The testimony and the statistical evidence demonstrates that there was never a Black or Mexican-American hired as an over-the-road driver in Houston, Texas. The Company may not evade its burden of having to pay to rectify this discrimination by saying the seniority system is the unions' responsibility alone.

Costs

The question of attorneys' fees and other costs involves an allocation of responsibility for this discrimination among the various defendants. The 1964 Civil Rights Act provides that

the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs. 42 U.S.C.A. § 2000a-3(b). The Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees. *Jinks v. Mayes*, 464 F.2d 1223 (5th Cir. 1972). All defendants argue that they have no responsibility for the discrimination. As noted earlier, this court holds that the primary responsibility for the discriminaton against the class is the Company's since the Company is the one that practiced overt discrimination in transferring which resulted in locked-in discrimination of the dual seniority system. Both the International and the Southern Conference, on the one hand, and the Local, on the other hand, argue that because of the collective bargaining structure they have nothing to do with any discrimination. The unions' attempts to wash their hands of the discrimination must fail. As far as the Local is concerned, it acquiesced in the discrimination practiced against its members. Further, the Local gave a written power of attorney to a bargaining committee representing the Southern Conference of Teamsters (the National Teamster Union is divided into various regional conferences, one of which is the Southern Conference) which negotiated the contract. The bargaining agreement authorizing this seniority system was signed by the Local and also negotiated by an agent of the union, and, therefore, the Local is responsible for it. International and Southern Conference argue that any discrimination is a matter between the Company and the Local. These unions argue that neither International nor Southern Conference was a bargaining agent of the Local. To understand this contention reference must be made to the manner in which collective bargaining arguments are reached. The basic nationwide contract between the Teamsters Union and employers throughout the country is the National Master Freight Agreement. This is negotiated by committees representing local unions and various employers. Incorporated into the National Master Freight Agreements are various supplemental agreements entered into between negotiating committees for the Teamsters locals in the conference in

question and committees for the employers in the conference. These supplemental agreements affecting the class in this suit are the Over-the-road Supplemental Agreement and the Local Freight Forwarding Supplemental Agreement for the Southern Conference and they are signed by the local union. Even though in theory perhaps neither the Southern Conference nor International are part of the agreements, in practice the negotiating committee is made up of International and Southern Conference officials at least in part responsible for its outcome. As this court said earlier, all union organizations violated their duty under § 1981 to protect the class from discrimination. Therefore, this court awards the costs of this action to the plaintiffs; such costs are to be taxed against the defendants and allocated as follows: one-half (½) to be paid by the Company, the other one-half (½) to be paid equally by the three union organizations. Included in such costs, but not limited thereto, are the following:

(a) Expert witness fee for Dr. Richard A. Tapia, who testified on behalf of the plaintiffs and who prepared certain studies at the court's request ..... $ 3,000.00

(b) Attorneys' fees to Mandell & Wright (Sidney Ravkind), attorneys for Leonard A. Ramirez $12,500.00

(c) Attorneys' fees for Rosenthal & Rosenblum (Messrs. Henry Rosenblum, Alvin Rosenthal and Ronald Cohen), attorneys for the Class $35,000.00

(d) Such other and further costs which are ordinarily taxable in litigation of this nature.

As to (a), (b), and (c), this court finds the amounts set forth therein are reasonable under the circumstances in light of the time spent in preparation and litigation of the cause, the com-

plexity of such preparation and litigation, and the novelty of the issues.

Plaintiffs have also sued defendant unions alleging a breach of duty of fair representation under 29 U.S.C. § 151. The landmark case on the duty of fair representation is *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 191, 89 L.Ed. 173 (1944). This case held that a bargaining representative of employees has a duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & Nashville R.R. Co., supra* at 202, 203; 89 L.Ed. at 183. The evidence on this point was rather meager—almost entirely what this court denotes as "remote circumstantial." For that reason, this court reluctantly holds that there has been no breach of fair representation by any of the unions defendants. The unions have acquiesced in a seniority system that perpetuates past discrimination but that does not give rise to a breach of their duty of fair representation. To breach this duty there must be evidence that the unions acted unfairly or unimpartially or not in good faith or with hostile discrimination. *Richardson v. Texas & New Orleans R.R. Co.*, 242 F.2d 230 (5th Cir. 1957).

To sum up, plaintiff Sabala may represent all Mexican-Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas. Plaintiff Sabala and the class he represents and plaintiff Ramirez have proved discrimination against the defendant Employer under § 1981 and § 2000e and against the defendant Local, Southern Conference, and International under § 1981. Both Company and unions are to some extent responsible for this discrimination although the Company has the greater burden of responsibility. Plaintiffs have not shown a breach of the duty of fair representation by any of the defendant unions. This court enjoins all defendants from continuing the discriminatory prac-

tices discussed herein and orders the parties to implement the affirmative action relief ordered by this Opinion.

Except as included in this supplemental Opinion, each party's requested proposed findings of fact and conclusions of law have been, and the same are hereby, denied and this supplemental Memorandum and Opinion along with this court's prior Memorandum and Order dated July 17, 1973, as reported in 362 F. Supp. 1142, will constitute the entirety of this court's findings of fact and conclusions of law relating to all aspects of this case.

Done at Houston, Texas, on this the 26th day of February, 1974.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX C

In the United States District Court
For the Southern District of Texas
Houston Division

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated, vs. Western Gillette, Inc., et al.	Civil Action. No. 71-H-961.
Leonard M. Ramirez, vs. Western Gillette, Inc., et al.	Civil Action. No. 71-H-1338.

FINAL JUDGMENT

(Filed February 26, 1974)

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the Court having made its Findings of Fact and Conclusions of Law, and a Memorandum and Order having been duly rendered, it is hereby

Ordered that the Defendant, Western Gillette, Inc. pay to the persons named below the amounts set forth opposite their names in the far right hand column (V); provided, however, that no such payment shall be due any discriminatee, until such discriminatee shall have met the conditions of accepting over-the-road employment as set forth in the Memorandum and Order rendered contemporaneously herewith:

I. Name of Discriminatee	II. Individual Discriminatees Actual Earnings* Through July 17, 1973	III. Estimated Line Driver Pay (II × 1.56)	IV. Line Driver Pay Less 10% (III − 10%)	V. Amount Due Discriminatee (IV − II)
Raymond O'Neal	$55,427.03	$86,466.17	$77,819.55	$22,392.52
George Williams	$44,841.64	$69,952 96	$62,957.66	$18,116.02
Luther Thomas	$54,110.95	$84,413.08	$75,971.77	$21,860.82
Alfonso Adams	$49,645.08	$77,446.32	$69,701.69	$20,056.61
Thomas Lindley	$49,726.72	$77,573.68	$69,816.31	$20,089.59
I. V. Phlegm	$57,137.51	$89,134.52	$80,221.07	$23,083.56
Frank Fountain	$39,208.98**	$61,166.01	$55,049.41	$15,840.43
Essie McGregor	$58,137.32	$90,694.22	$81,624.80	$23,487.48
Herman Carrier	$48,591.42	$75,802.62	$68,222.36	$19,630.94
John Roberson	$55,432.19	$86,474.22	$77,826.80	$22,394.61
Roy Rodriguez	$44,607.21	$69,587.25	$62,628.53	$18,021.32
Henry McTear	$47,570.79	$74,210.43	$66,789.39	$19,218.60
Leonard Ramirez	$37,346.57***	$58,260.65	$52,434.59	$15,088.02
Oliver Sabala	$43,612.18	$68,035.00	$61,231.50	$17,619.32
Lewis Norman	$42,085.68	$65,653.66	$59,088.29	$17,002.61
Robert Clark	$39,176.99	$61,116.10	$55,004.49	$15,827.50
Charles O'Neil	$37,701.07	$58,813.67	$52,932.30	$15,231.23
Grover Williams	$35,628.04	$55,579.74	$50,021.77	$14,393.73
Edgar Williams	$32,556.99	$50,788.90	$45,710.01	$13,153.02
Deford Bailey	$20,867.33	$32,553.03	$29,297.73	$ 8,430.40
Claudell Lipscomb	$20,682.31	$32,264.40	$29,037.96	$ 8,355.65
Ormogene Dosty	$15,940.58	$24,867.30	$22,380.57	$ 6,439.99
Ellsworth Pinkins****				

* Adjusted to 6/3/68 or "Rightful Place" Seniority Date whichever is later.

** Adjusted to exclude 11 months of earnings during which discriminatee's vision would have prevented his working as an over-the-road driver.

*** Reflects earnings only through July 1972 when discriminatee transferred to over-the-road in Salt Lake City, Utah.

**** No back pay due since no jobs have been available in Houston since discriminatee was qualified.

It Is Further Ordered that the costs of this action are taxed against the Defendants and allocated as follows: One-half (½) to be paid by the Company, the other one-half (½) to be paid equally by the three union organizations. Included in such costs, but not limited thereto, are the following:

Expert witness fee for Dr. Richard A. Tapia . . . Three Thousand Dollars ($3,000.00), plus interest at the rate of 6% from the date of entry of this Judgment. Attorneys' Fee to Mandell & Wright . . . Twelve Thousand Five Hundred Dollars ($12,500.00), plus interest at the rate of 6% from the date of entry of this Judgment. Attorneys' Fee to Rosenthal & Rosenblum . . . Thirty-Five Thousand Dollars ($35,000.00), plus interest at the rate of 6% from the date of entry of this Judgment. Such other and further costs which are ordinarily taxable in litigation of this nature.

Dated: February 26, 1974.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX D

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellee-Cross-Appellant,

v.

Western Gillette, Inc., et al., Defendants-Appellants-Cross-Appellees.

Leonard M. Ramirez, Plaintiff-Appellee,

v.

Western Gillette, Inc., et al., Defendants-Appellants.

No. 74-2711.

United States Court of Appeals, Fifth Circuit

Aug. 4, 1975.

Consolidated actions were brought by black and Mexican-American employees who claimed that the existence of a dual seniority system locked in the effect of past discriminatory employment practices. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., found that the employment practices were discriminatory and perpetuated the effects of past discrimination, 362 F.Supp. 1142, and awarded back pay and rightful place seniority relief to the individual discriminatees, 371 F.Supp. 385. Plaintiffs, employer and unions appealed. The Court of Appeals, Wisdom, Circuit Judge, held that the district court's findings that the employer discriminated against members of the plaintiff class by denying them the opportunity to transfer from "city" truck-driving

jobs to "road" jobs and that the continued maintenance of a dual seniority system perpetuated past discrimination were not clearly erroneous; that the district court's finding of union participation in discrimination were not clearly erroneous; that the district court did not err in refusing to condition back pay relief on a discriminatee's having made formal application for "road" job; that the union could be held liable for back pay; that to recover attorney's fees under Civil Rights Act of 1871, plaintiffs were required to depend on one of the traditional exceptions to the general rule disallowing attorney's fees; and that the district court's statement of reasons supporting the amount of attorneys' fees award was inadequate.

Affirmed in part, reversed in part and remanded.

1. *Civil Rights Key 38*

Filing of Equal Employment Opportunity Commission charges was not condition precedent to employment discrimination suit under Civil Rights Act of 1871. 42 U.S.C.A. § 1981.

2. *Courts Key 406.3(20)*

In action by black and Mexican-American "city" truck drivers against employer and union alleging that existence of dual seniority system for "city" and "road" drivers locked in effect of past discriminatory employment practices, district court's findings that employer discriminated against members of the plaintiff class by denying them the opportunity to transfer from "city" to "road" jobs and that dual seniority system perpetuated past discrimination were not clearly erroneous. 42 U.S. C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S. C.A. § 2000e et seq.

3. *Civil Rights Key 9.10*

General decline of business with its concomittant effects on employment magnifies rather than lessens need for strict compliance with requirements of federal Civil Rights Acts. 42 U.S. C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S. C.A. § 2000e et seq.

4. *Civil Rights Key 38*

Discriminatory intent is not essential element of employment discrimination action. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. *Civil Rights Key 44(1)*

In employment discrimination action, pattern of past discriminatory hiring may be established by statistical evidence in conjunction with other evidence or by statistical evidence alone. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. *Civil Rights Key 46*

Where existence of dual seniority system for "city" and "road" truck drivers locked in effect of past discriminatory employment practices in denying minority drivers more lucrative "road" positions, district court's utilization of modified seniority system whereby road drivers from one terminal were able to "bump" drivers with less seniority at another terminal in its determination of rightful place seniority dates for discriminatees was not abuse of discretion. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. *Courts Key 406.3(20)*

In action by black and Mexican-American "city" truck drivers against employer and union alleging that existence of dual seniority system for "city" and "road" drivers locked in effect of past discriminatory employment practices, district court's finding that local, regional and national unions participated in discrimination was not clearly erroneous, even though local union actively petitioned national bargaining committee to merge separate seniority systems. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. *Civil Rights Key 46*

Where dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, and employer had filled whatever vacancies existed in "road" positions with white drivers who were allowed to "force-on," district court properly awarded discriminatees back pay without regard to whether individual discriminatee actually made inquiries about possibility of transfer to "road" jobs. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. *Civil Rights Key 46*

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, district court did not abuse its discretion in calculating back pay relief on basis of what a representative "road" driver and a representative "city" driver earned. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. *Civil Rights Key 46*

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, district court did not abuse its discretion in allowing back pay relief only until date of its first order rather than extending such relief to date that each individual discriminatee achieved "road" driver status. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. *Civil Rights Key 46*

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow "city" truck drivers to transfer to "road" driver positions, awarded back pay relief to date of its first order, and retained jurisdiction for one year to evaluate employer's efforts in remedying discrimination and to order further relief if necessary, district court should have retained jurisdiction for such further time as might be necessary to carry out that further relief. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. *Civil Rights Key 46*

Where union was found partially liable for maintenance of dual seniority system which locked in effect of past discrimination, union as well as employer was subject to back pay award. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

13. *Civil Rights Key 46*

Employment discrimination plaintiffs under Civil Rights Act of 1871 were required to depend on one of the traditional exceptions to general rule disallowing attorneys' fees if they were to recover such fees. 42 U.S.C.A. § 1981.

14. *Federal Civil Procedure Key 2737*

District court order basing award of attorneys' fees on finding that amounts were reasonable under circumstances in light of time spent in preparation of litigation of cause, complexity of such preparation and litigation and novelty of issues was inadequate to facilitate meaningful appellate review of award.

Appeals from the United States District Court for the Southern District of Texas.

Before Wisdom, Simpson and Roney, Circuit Judges.

Wisdom, Circuit Judge:

This title VII—Section 1981[1] employment discrimination class action[2] involves facially neutral seniority systems in a trucking company employing city drivers and road drivers.

Western Gillette, Inc., a nation-wide trucking company, employs Oliver Sabala, a Mexican-American, as a city driver at

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[1] 42 U.S.C. § 2000e *et seq.*; 42 U.S.C. § 1981.

[2] Initially, two suits were brought and consolidated in the district court. Oliver Sabala brought suit individually and on behalf of all others similarly situated in Sabala v. Western Gillette, No. 71-H-961. Leonard Ramirez brought suit individually in Ramirez v. Western Gillette, No. 71-H-1338. The issues are substantially the same on appeal, and Ramirez has filed no brief in this Court. References to Sabala hereafter will be used to designate the appellees.

its Houston terminal. Sabala brings this action on behalf of all Mexican-Americans and blacks employed as city drivers at the Houston terminal. He attacks the separate seniority systems established for city and road drivers under the Company's collective bargaining agreement. Sabala contends that the facially neutral practices of maintaining separate lines of progression for road and city drivers, and of requiring city drivers to forfeit their job seniority to transfer from city to road jobs, effectively lock minority employees into the lower-paying city jobs. These practices, Sabala contends, perpetuate the effects of past racial discrimination in that they prevent minority drivers, historically relegated to the less desirable city jobs, from moving to the road. We have previously considered the discriminatory effect of these "ubiquitous practices in the trucking industry" in the Rodriguez trilogy.[3] See Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40; Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, 505 F.2d 66; Resendis v. Lee Way Motor Freight, Inc., 5 Cir. 1974, 505 F.2d 69.

Sabala also contends that the Company has discouraged transfers, and thus prejudiced the plaintiff class, by overt acts

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[3] We have previously noted the effect of these practices in the trucking industry:

> As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pickup and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is noth-

of discrimination. Sabala alleges that he applied for a road job with Western Gillette in 1967 and was denied such employment because of his race. He was then offered the position of city driver, which he accepted. He has since made numerous unsuccessful attempts to transfer to the road. His complaint alleges that the Company's operations manager told him that he could not "hire your people for the road." Other class members testified that they had not been permitted to apply for road jobs.

The district judge, the Honorable John V. Singleton, Jr., found that the employment practices at the heart of this litigation were discriminatory and perpetuate the effects of past discrimination in violation of Title VII and Section 1981. He enjoined the defendants from continuing discriminatory practices, ordered changes in the seniority system, and awarded back pay and rightful place seniority relief to the individual discriminatees. The court also ordered that the defendants pay the plaintiffs' costs and attorney's fees. The defendants and the class plaintiffs appeal.

The judgment of the district court is affirmed in part, reversed in part, and remanded.

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ing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been virtually all-white/Anglo.

Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 53. See also Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687. Leone, The Negro in the Trucking Industry, U.Pa. (Wharton School Industrial Research Unit), Rep. 15-1970; Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads, E.E.O.C. No. EEO 72001 (1971).

I

Sabala's suit against Western Gillette rests on Title VII and Section 1981; his suit against the three union defendants rests on Section 1981 exclusively.[4] He contends that the collective bargaining agreements creating separate systems for road and city drivers together with the conditions imposed on transfer are so onerous as to make transfer virtually impossible. Although facially neutral, these practices discriminate in their purpose and effect.

Title VII requires that charging parties exhaust their administrative remedies before they sue in federal court. Although their right to sue is not conditioned on the EEOC's finding of reasonable cause to believe that discrimination has occurred, they may not circumvent the agency's processes. "[I]f charges of employment discrimination have not been filed against the unions, the appellants' right to file suit has not ripened." Miller v. International Paper Company, 5 Cir. 1969, 408 F.2d 283, 291. See also McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 798-99, 93 S.Ct. 1817, 36 L.Ed. 2d 668. In their EEOC charges, the plaintiffs alleged only that Western Gillette was guilty of employment discrimination; they made no allegation of discrimination by the union. Following *Miller*, the district court found that it had jurisdiction over the

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[4] Sabala's complaint states two separate theories of recovery. First, Sabala alleges that the defendants, International Brotherhood of Teamsters, Southern Conference Teamsters, and Local 988, violated their duties of fair representation under 29 U.S.C. § 151 because they knowingly acquiesced, joined, or conspired with the company, in the alleged discriminatory practices. The complaint also alleges that they have neglected to take any affirmative steps toward protecting Mexican American and black employees from those practices. The district court found that none of the union defendants breached its statutory duty of fair representation. Sabala v. Western Gillette, S.D.Tex. 1973, 362 F.Supp. 1142, 1156. The plaintiffs do not appeal from that finding and we need not consider that issue here.

Company, under 42 U.S.C. § 2000e, but that it did not have jurisdiction over the union defendants under that section.

[1] The claim under Section 1981, on the other hand, is an independent cause of action. The Supreme Court has noted that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver Company, 1974, 415 U.S. 36, 48-49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147. The filing of EEOC charges is not a condition precedent to suit under Section 1981. See Alpha Portland Cement Company v. Reese, 5 Cir. 1975, 507 F.2d 607, 610. "Section 1981 and Title VII . . . provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." Macklin v. Spector Freight Systems, Inc., 1973, 156 U.S.App.D.C. 69, 478 F.2d 979, 996. The district court properly found that it had jurisdiction over the employer and the union defendants under Section 1981.

The trial of this cause was conducted in a bifurcated proceeding. The first part of the trial, which considered the issues of jurisdiction and liability, took place in October and November of 1972. Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142. After the court found jurisdiction and liability, the trial court conducted a second hearing in November, 1973 on issues pertinent to fashioning a remedy. Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385. The bifurcation of the cause anticipated the procedure recently suggested by this Court in Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437.[5]

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[5] In Baxter, Judge Gewin wrote:

"A Title VII class action suit presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to es-

On the basis of testimonial and statistical evidence, the trial court concluded that the employer had discriminated in the past against the plaintiff class and that the present dual seniority system, as applied, perpetuates past discrimination by deterring minority employees from transferring to the road because of the necessary loss of their job seniority. The district court then considered whether the Company's present dual seniority system is justified by any business necessity. "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." Local 189, United Papermakers and Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 989. See also Carey v. Greyhound Bus Co., 5 Cir. 1974, 500 F.2d 1372, 1376. The district court found no evidence in the record to suggest any legitimate nonracial business purpose that would justify the continued maintenance of dual seniority systems for road and city drivers at the Houston Terminal.[6] Moreover, it found that both Western Gillette and the defendant unions were responsible for this discrimination.

In fashioning a remedy the district court declined to require a complete merger of the two seniority systems on the ground

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tablish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus entitled to back pay or other appropriate relief."

495 F.2d 437, 443-44.

[6] See Rodriguez v. East Texas Motor Freight, 5 Cir. 1975, 505 F.2d 40, 56-59.

that the relief would inequitably affect the seniority of various groups of Western Gillette employees. "There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions." Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 61. The trial judge noted that such a complete merger of the seniority lines would have various shortcomings. "It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs." Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385, 388. The trial judge ordered that all class members be afforded an opportunity to transfer to the road positions that had been denied to them, either by outright discrimination or by virtue of having been locked into their city jobs because of the collective bargaining agreement. The court determined that relief should be sufficiently broad to insure that a transferring discriminatee would be able to keep his road job once he obtains it. The trial court ordered, therefore, that transferring discriminatees be given their "rightful place" seniority dates to facilitate the maintenance of their new positions. "A complete decree must give enough relief to insure that the transferred discriminatees are able to *maintain* their rightful place. Thus the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carry-over to permit the advancement he would have enjoyed, and to give him the protection against layoffs he would have had, in the absence of discrimination." *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 411, 450.

The trial court also provided for the award of back pay to city drivers who had been able and willing to transfer to the road, but were denied the opportunity to do so because of racial discrimination. The court did not require that the discriminatees offer proof that they had individually applied for road jobs that were in fact open.[7] Although an application requirement would be an easy device for establishing the identity of class members who should recover damages and for establishing an appropriate date for application of the rightful place doctrine, the equities of such a requirement are almost certainly illusory. It makes little sense to require of minority employees, retrospectively, formal application for transfer to positions that they reasonably knew to have been closed to their class.[8] Although a few city drivers may have had the courage, intransigence, or naivete to apply for road jobs that were categorically and impermissibly

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[7] In Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, we said:

> "[T]he initial burden is now placed on the individual labor department employee to show that he is a member of the recognized class subject to employment discrimination, . . . Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude . . . If an [individual] employee can show that he was hired into the labor department . . . and was subsequently frozen into that department because of the discriminatory employment practices established here, thus we think the individual discriminatee has met his initial burden of proof . . . It will be incumbent upon Goodyear to show by convincing evidence that other factors would have prevented his transfer regardless of the discriminatory employment practices . . . Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to applicable equitable principles."

491 F.2d 1364, 1379-80. See also Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 259.

[8] In the present case, the company has steadfastly maintained that road jobs do not exist while, at the same time, it has allowed white "casuals" to gain road employment by forcing on into those jobs. This fact, in concert with the impediments to transfer found in the overt discrimination and loss of seniority penalty established in the district court, would make formal application appear to be a futile act.

beyond their reach, most would certainly not have bothered to make application in such circumstances. "If an employee realize full well that blacks are simply not hired as road drivers, why should he bother to apply?" Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 451.

Judge Singleton held that no back pay should be computed for time after July 17, 1973, the date he had ordered that the discriminatory practices be terminated. He found that a road driver for Western Gillette expends 10 per cent of his gross annual pay on employment-related expenses and that such an amount should be deducted from back pay awards to discriminatees. With regard to deductions for "moonlight" earnings actually earned by the discriminatees (which they would not have been able to earn as road drivers), the court found the evidence inconclusive, retained jurisdiction to consider further evidence, and conditioned award of back pay to any discriminatee on his providing the court with sufficient information to make such a determination. Finally, the court provided that no discriminatee should receive back pay until Western Gillette had offered him a road job, which he had accepted, and which he had held beyond the 180-day retreat period. If the discriminatee were willing to waive the 180-day retreat period, then he would be able to receive his back pay award at the time of waiver.

The parties make numerous assignments of errors on appeal. Western Gillette contends that the trial court erred in finding that the Company discriminated against the plaintiffs. The Company also argues that the court erred in assigning "rightful place" seniority dates for the purpose of fashioning affirmative relief. Western Gillette contends, too, that the trial court erred in not restricting the award of back pay to those members of the plaintiff class who in fact sought transfers to the road and were denied such transfers for discriminatory reasons. Next, the Company insists that the trial court erred in its method of

calculation of back pay. Finally, Western Gillette contends that the trial court should have provided that the defendant unions in this action share in the burden of satisfying the back pay award to the plaintiffs.

The International Brotherhood of Teamsters and the Southern Conference contend that the trial court erred in assessing attorney's fees and costs against the defendant unions under Section 1981. They also contend that the trial court erred in basing the seniority relief accorded the plaintiff class on the Company's modified seniority system and Committee-ordered changes of operation.

Local 988 contends that the district court erred in finding that the local violated Section 1981 by delegating its bargaining authority to the National Committee and by signing the separate Road and City contracts negotiated by the National Committee and ratified by the national membership. The local suggests that it should not be liable under Section 1981 because it had no discriminatory intent. As proof of this fact, the local points to its 1970 recommendation to the National Committee that the separate seniority lines of road and city drivers should be merged.

Finally, Sabala contends that the trial court erred in its back pay calculation in that the court should have extended the defendants' liability for back pay until the date the discriminatees in fact achieved road driver status. Sabala also contends that the trial judge erred in limiting the award of attorney's fees to $35,000.

II

[2] We must first determine whether the trial court erred in finding that Western Gillette discriminated against members of the plaintiff class by denying them the opportunity to transfer from city to road jobs. Western Gillette challenges the trial

judge's findings on three grounds. First, the Company contends that no discrimination is shown in the records because there is no showing that jobs were available at the Houston Terminal during the period in question. Second, Western Gillette argues that the testimonial evidence does not establish overt discrimination. Finally, the Company contends that the statistical proof of discrimination adduced at trial is insufficient to support a finding of discrimination.

A. *JOB AVAILABILITY*

[3] The existence of a job vacancy, as Western Gillette correctly asserts, is logically necessary to a finding that a member of a disfavored class was denied employment because of impermissible discrimination. The Company contends that the business of its Houston Terminal has declined steadily and that no new road positions have become available during the period in question. The general decline of a business, with its concomitant effects on employment, of course, magnifies rather than lessens the need for strict compliance with the requirements of the federal civil rights acts. We have considered this problem previously in United States v. Jacksonville Terminal Company, 5 Cir. 1971, 451 F.2d 418. In *Jacksonville Terminal*, we held that the continued use of craft and class seniority systems to restrict the transfer and promotion of incumbent black employees at the declining Jacksonville railway terminal was neither *bona fide* nor a business necessity, and was in violation of Title VII requirements. "In any industry loss of seniority is a critical inhibition to transfer . . . At the Terminal where total employment has decreased in recent years and preservation of seniority has become essential to economic survival, this transfer impediment is indeed monumental. It cannot survive Title VII's remedial impact." 451 F.2d 418, 452. In *Jacksonville Terminal*, we said that the government, or the discriminatees, must prove that whites received job assignments that were denied blacks,

that the jobs were available when the blacks applied, and that blacks' qualifications were at least equal to those of the hired whites. 451 F.2d 418, 446.

Although Western Gillette contends that no jobs became available at Houston during the period in question, the trial judge found that a number of white "casuals"[9] had been able to "force-on" into regular road jobs and become new road drivers at the Houston Terminal. The trial court concluded that the ability of casuals to force-on into regular road jobs demonstrates that jobs were in fact available. The Company characterizes the Court's conclusion as seeking "to avoid the problem of the absence of job availability". We find no substance to that characterization.

A casual employee is one who is hired to work temporarily during the Company's periods of heavy volume traffic. Billy Lacy, a Western Gillette official, testified at trial:

> "Well, we have several interline carriers that we do business with who bring us freight from over in the southeast—Alabama, Georgia, Florida—and they bring freight in and give it to us in Houston, which we take on west.
>
> Sometimes we get a lot of freight from them when we weren't expecting very many loads. Sometimes we have—we haul a lot of government ammunition or government commodities, whatever. Maybe some big shipper that we haven't done business with very often in the past will come up and say, 'Hey, I've got fifteen loads of freight that I'm going to have to move from here to Los Angeles in the next two weeks. Can you handle it?'
>
> We say, 'Yes. We'll take it.'
>
> Things of this nature cause us to use casuals."

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[9] Casual drivers have no seniority. They are not required to work for only one company, but may take jobs with a number of companies located in their areas.

Under the terms of the collective bargaining agreement, a driver who works as a casual driver is able to force himself into regular employment if, working as a casual, he is able to earn an average of $150 per week for four consecutive weeks. Whether a particular casual employee is able to earn an average of $150 per week for four consecutive weeks depends, of course, on whether the Company is willing to give an individual driver a sufficient number of trips to meet that figure. Instead of giving a large number of trips to one casual driver, the Company may give a smaller number of trips each to several drivers. In this way, the Company could prevent any individual driver from accumulating a sufficient number of trips to force on as a regular driver. Assuming good management, the Company need never hire a casual who will have forced on; it is entirely within the Company's power to prevent casuals from satisfying the necessary requirements for forcing on. This fact was brought out at trial when the trial judge asked Lacy: "if the terminal operator were on his toes and he had a casual working for him that he didn't like or didn't think was doing a good job, wasn't qualified, he would never let him get to the point where he forced himself on you, would he?" Lacy replied, "That's what I tell some of our terminal managers sometimes. That's true."

The evidence adduced at trial demonstrates that the power to exclude force-ons from permanent employment rests entirely with the Company. Western Gillette now contends that the successful forcing on of casual drivers at Houston demonstrates only that the terminal manager was inept in allocating work assignments to casual employees, and not that there were jobs available. The evidence, the Company suggests, establishes that no jobs were available as a matter of company judgment; all force-ons were simply the result of lax management by the Company's Houston administrative personnel. We find this argument unconvincing. Here, as elsewhere, contemporaneous company practice speaks more truly than retrospective statements of company judgment. The Company had both the power and the

business motivation to exclude force-ons from permanent employment if jobs did not exist. It did not choose to do so. We think, therefore, that the trial court's finding that jobs existed is reasonable.

[4] As a final line of defense, Western Gillette contends that the presence of lax management and business conditions that resulted in the use of casuals do not establish any discriminatory intent on the part of Western Gillette. Discriminatory intent is not, of course, an essential element of an employment discrimination action. "Whether an employer is beneficient or malevolent in implementing its employment practices, the same prohibited result adheres if they are discriminatory, economic loss for the class of discriminatees." Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 443. See also Johnson v. Goodyear Tire & Rubber Company, 5 Cir. 1974, 491 F.2d 1364. Moreover, we think that any inquiry into the possible existence of discriminatory intent is particularly irrelevant at this stage of analysis. The issue at hand concerns only the factual question whether employment opportunities existed at Western Gillette's Houston Terminal. The trial court found that the Company allowed casuals to force on as regular line drivers and that this company practice demonstrates the existence of jobs. These findings cannot be set aside as clearly erroneous. See Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 445; Smith v. Delta Airlines, Inc., 5 Cir. 1973, 486 F.2d 512, 514.

B. *OVERT DISCRIMINATION*

The plaintiffs do not allege that Western Gillette formally and categorically prevents transfers of its employees from city to road jobs.[10] Instead, they allege that Western Gillette discour-

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[10] An absolute bar to transfer is not, of course, required to demonstrate that members of the plaintiff class have been locked in posi-

ages its city drivers, most of whom are black or Mexican American, from transferring to road jobs, both by acts of overt discrimination such as ignoring inquiries about possible transfer opportunities and by requiring transferees to divest themselves of their job seniority. See Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 48. The plaintiffs presented testimonial evidence to establish that the company overtly discriminated against individual members of the plaintiff class. The trial court found that testimony convincing and concluded that Western Gillette had discriminated against class members who wished to transfer. The Company now argues that the court's conclusion does not "square" with the testimony presented at trial.

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tions that they hold because of past discrimination. We considered similar circumstances in *Rodriguez*:

> The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters . . . have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed *all realistic opportunity for transfer*. Under the no transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off he would have no "bumping" rights to recover his city driver job . . . It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the Company was thus continued and perpetuated by the no-transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 56 (emphasis added).

We conclude that sufficient evidence of overt acts of discrimination was adduced at trial to allow the district court to find that the Company discriminated against members of the plaintiff class. Oliver Sabala, for instance, testified that he was working in 1967 for another trucking company, Big 3, when Western Gillette drivers told him that the latter company was in the process of hiring road drivers. Harper, Western Gillette's manager, told Sabala, whom he had known previously, that he was unable to offer Sabala a road job. Harper also told Sabala that he had plenty of work in the city and would be willing to hire him there. Sabala testified that Harper said, "If I do anything else, you'd get us both run off." According to Sabala, Harper also said, "[W]e don't hire your people on the road, and if I wanted to hire you, I couldn't."

Western Gillette now contends that Harper's alleged statements are ambiguous and probably mean only that Harper was unable to offer Sabala a road job because the Company did not have any road jobs available. When extracted from its natural context, Harper's language may indeed appear ambiguous. When set within the framework of the evidence as a whole, however, its meaning is clear. These statements are not the only evidence of overt discrimination.

Sabala testified that he accepted Harper's offer of employment with Western Gillette as a city driver, with the hope that he would be able to move to the more lucrative road job at some time in the future. After he accepted the city job, Sabala allegedly made numerous attempts to transfer to the road but Western Gillette rebuffed those efforts.

Other members of the class also testified that their efforts to move from city to road jobs had failed. Alphonso Adams testified that he asked Western Gillette's Houston operations manager if he could move to the road and that he was told, in response, that he would have to quit his city job, lose his seniority,

and start all over, as if he were a new employee. Frank Fountain testified that he asked the operations manager for an application to transfer to the road and was told that he would have to resign from the city to go on the road. The manager then told Fountain that he should not think about going out on the road because he would be laid off shortly after he had resigned his city job to go to the road. Although Western Gillette's counsel suggested to Fountain that the manager may have been trying to inform him of the dangers implicit in transfer, Fountain stated unequivocally that he understood that the manager was attempting to dissuade him because he did not want him to have the job. The manager's refusal to give Fountain an application, after Fountain said that he understood the implications of transfer, substantiates that interpretation.

Taking the evidence as a whole, we conclude that the trial court's finding of overt acts of discrimination is not clearly erroneous.

C. *STATISTICAL EVIDENCE*

The trial court found that Western Gillette's employment statistics prove the existence of discrimination. The statistics show that no black or Mexican American has been hired by Western Gillette as a new road driver in the Southern Conference. Two blacks and a Mexican American currently work on the road for Western Gillette in the Southern Conference, but these three men all transferred to the Conference from road positions with the Company in other sections of the country.

At Houson, Western Gillette has 29 road drivers. One of these drivers is a Mexican American; none is a black. The racial composition of the city drivers at Houston is radically different. The eleven drivers who were hired in 1956 or before are all blacks. Fifty-four drivers have been hired since

1956. Twenty-three are white, twenty-five are black, and six are Mexican American. From these statistics, the trial court found that a pattern of discrimination against minority group road drivers exist at Western Gillette's Houston terminal.

[5] A pattern of past discriminatory hiring is essential to the plaintiff's case. That pattern may be established by statistical evidence in conjunction with other evidence or by statistical evidence alone. Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 53. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120.

Of the twenty-nine road drivers at Houston, only one belongs to a minority group. Of the sixty-five city drivers at Houston, forty-two are either blacks or Mexican Americans. The defendants argued in the trial court that these statistics do not show racial discrimination because the exclusion of minorities from road jobs was not total. The trial court properly rejected that line of reasoning.

The defendants now contend that the hiring statistics are irrelevant and that the transfer statistics, which show that some minority group members did transfer in the Southern Conference, are more relevant to the issues here. We must emphasize the specific focus of our inquiry here: whether the Company has had a policy of racial discrimination. Obviously, both sets of statistics are relevant to that inquiry. We think, nonetheless, that the hiring statistics may be better evidence of discrimination than are the transfer statistics.[11]

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[11] The defendant's argument is that the transfer statistics demonstrate that some minority employees, despite overt discrimination and the loss of their seniority, have been willing to transfer. Since these artificial barriers to transfer are themselves discriminatory, the fact that some class members have been willing to take their chances and transfer despite the overt hostility of company officials and the loss of job seniority is insignificant. No allegation has been made

If the plaintiff's theory is correct, the Company has used the loss of seniority transfer penalty to inhibit the movement of minority employees from city to road jobs. As more white city drivers have appeared on the scene, this penalty has obviously affected their transfer plans as well. The penalty, therefore, has become a blunt instrument of discrimination and has inhibited both white and minority city drivers in transferring from their city jobs. The result is that few city drivers of either race transfer to the road. From a purely statistical viewpoint, comparison of white and minority transfer is of limited utility because of the small size of the sample. If the design of the loss of seniority penalty is to prevent the transfer of city drivers to the road, it makes little sense to compare the numbers of white and minority city drivers who have transferred despite the loss of their seniority. The seniority loss penalty throws up a road-block to all city drivers in pursuit of road jobs and screens out some whites as well as minority personnel although, historically, most city drivers were black. The material distinction is, of course, that the white drivers could have applied for road jobs initially. We have noted this fact elsewhere:

> Those white drivers who were employed as city drivers presumably had the opportunity to apply as road drivers but either were not qualified or preferred city work. Unlike . . .
>
> [the plaintiffs], the white drivers were not barred from the position of road driver by virtue of their race. Consequently, though the no-transfer policy may serve to keep all drivers in their present positions, the discriminatory hiring practices . . . colors the policy . . . with a distinctively discriminatory tint.

Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 690.

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that the company has absolutely and categorically barred transfer. The discrimination it has practiced is more subtle than that. Consequently, the company's reasoning is circular and the point it makes is trivial.

The number of transfers was insignificant; most of the new road drivers are not transfers, but casuals who have been able to force on. They are all white. The statistical evidence is impressive.

III

Western Gillette next contends that the trial court erred in determining that the dual seniority system perpetuates past discrimination.

We think that the statistical evidence of discrimination and the testimonial evidence relating to Western Gillette's overt acts of discrimination, noted above and in the trial court's order, demonstrate the existence of past discrimination. Moreover, the evidence shows that the dual seniority system perpetuates past discrimination. Consequently, we find no merit to this contention.

IV

[6] A modified seniority system is in effect at all Western Gillette's terminals in the Southern Conference. Under this modified seniority system, a road driver who is on layoff due to a reduction in force at his home terminal may "bump in" at another Western Gillette terminal in the Southern Conference and take job assignments there on the basis of his home terminal seniority. He will then displace any road driver with less seniority at the host terminal. The purpose and effect of this modified seniority system is to permit senior men to maintain the most lucrative jobs by giving them the mobility to reach those jobs when conditions are not favorable at their home terminals.

The trial court utilized the modified seniority system in its determination of rightful place seniority dates for the discrimi-

natees at the Houston terminal.[12] The modified seniority system

[12] See Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 988.

effectively extends the road driver's universe of job opportunities to the whole Southern Conference. As a result, the trial court believed it proper to make the available universe of relief coterminous with the universe of job opportunities from which the discriminatees were excluded because of discrimination.

Under Title VII, Congress has granted the courts plenary equitable power to fashion an appropriate remedy for employment discrimination. Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 243. "Most courts, in molding appropriate remedies, have adhered to the 'rightful place' theory, according to which blacks are assured the first opportunity to move into the next vacancies in positions which they would have occupied but for wrongful discrimination and which they are qualified to fill." United States v. Georgia Power Company, 5 Cir. 1973, 474 F.2d 906, 927.

The trial court found that ten of the qualified class members would have accepted employment at any Western Gillette terminal in the Southern Conference. Thirteen class members would not have accepted employment anywhere but at the "declining" Houston facility. The trial court also found that road jobs were available both in Houston and elsewhere in the Southern Conference and that the discriminatees would have taken those jobs but for discrimination. Those discriminatees who wished to transfer out of Houston to more lucrative positions elsewhere in the Conference would have been able to do so, absent discrimination, because of the modified seniority system in effect.

The trial court assigned rightful place seniority dates by distinguishing between those discriminatees who would have accepted employment anywhere in the Conference and those who

would have accepted employment only at Houston. Those class members who would have accepted employment anywhere in the Southern Conference were assigned rightful place seniority dates based on the job next available anywhere in the Conference after the date on which a discriminatee was qualified to drive on the road. Those discriminatees who limited themselves to Houston employment were assigned seniority dates based on the job next available at Houston. See Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385, 388-89. In light of all the circumstances here, we think that this part of the relief ordered by the trial court was properly within its statutory discretion and conformed to its responsibility to frame an efficacious remedy.

V

[7] The union defendants contend that the district court erred in finding them responsible, in part, for the discriminatory practices at the heart of this lawsuit. Local 988 is the collective bargaining agent for the discriminatees who bring this action. The membership of Local 988 delegated its bargaining authority to the National Bargaining Committee and ratified the contract that the National Bargaining Committee negotiated. The stimulus for the local's actions was the recognition that the National Bargaining Committee could negotiate a better contract with Western Gillette than could the local by itself. The result of these negotiations was a collective bargaining agreement that the district court found discriminatory in its effects.

Local 988 contends that the fact of its minority control, together with the fact that the local did not initiate or negotiate the contracts, remove this case from application of the "landmark decisions" of this Court. See Local 53, Insulators v. Vogler, 5 Cir. 1969, 407 F.2d 1047; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d

980; United States v. Hayes International Corporation, 5 Cir. 1969, 415 F.2d 1038. Local 988 also notes that it actively petitioned the National Bargaining Committee to merge the separate seniority systems. Given the Local's informed decision to participate in the national bargaining negotiations despite discrimination, because of the tangible economic benefits a national contract promised to its members, we find the argument unpersuasive. See Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 443.

The other union defendants were parties to the national bargaining negotiations and the architects of the seniority systems. See Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1394.

In light of all the evidence, we hold that the district court's findings of union participation in discrimination were not clearly erroneous.

VI

[8] Western Gillette contends that the district court should not have granted back pay relief to any class member who did not in fact make formal application for a road job and who was not discriminatorily denied such employment. This argument, of course, contains within it the expectation that no one would receive back pay because Western Gillette has created no new jobs at the Houston Terminal since May 1966. Hence, no one could be discriminatorily denied transfer, because the absence of a job is the best reason for denying employment. United States v. Jacksonville Terminal, 5 Cir. 1971, 451 F.2d 418, 446.

As we have noted previously, there are 29 road drivers at Houston. Seven of these drivers are casuals who have been able to force on. The Company contends that the employment of seven casuals who have forced on due to "lax management in

peak periods of business stress" does not establish that a job was available or that the Company wished to fill a road position. A necessary element to a finding of job discrimination is that the alleged discriminatee be "qualified for a job for which the employer was seeking applicants". *McDonnell-Douglas Corporation v. Green*, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 668. We think, however, that the Supreme Court did not mean to suggest that a company could discriminate with impunity by filling available positions by other means, such as force-ons, rather than by entertaining applications. Western Gillette, as a business run for profit, could not rationally permit casuals to force on, and then continue, in non-existent jobs. We must conclude, with the district court, that new jobs did exist during this period.

Western Gillette chose to fill available jobs with casual employees whom the Company allowed to force on. At the same time, it refused to allow city drivers to carry over their job seniority to new positions if they transferred. We have held that this seniority penalty is unacceptable in that it perpetuates past discrimination. In these circumstances, we think that the district court properly awarded back pay without regard to whether an individual plaintiff actually made inquiries about the possibility of transfer to jobs (which the Company contends do not exist) on terms which we think impermissible. See *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 441, 451.

The trial court attempted to award back pay in an equitable manner, taking into consideration material differences among the individual discriminatees.[13] Western Gillette contends that

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[13] In making an award of back pay, considerable difficulty stems from the court's unavoidable problem of interpreting the significance of silence on the part of discriminatees. On the one hand, it may indicate disinterest. On the other hand, it may indicate a sense of futility. Moreover, only the most ingenuous would fail to note that the possibility of a large back pay award may stimulate retrospective interest where none initially existed. In these circumstances, the

the Court erred because one factor it thought immaterial was whether or not an individual applied for a job which the Company would tell him did not exist. The court acted reasonably. Part of the problem of fashioning back pay relief in this case springs from the Company's tenacity in maintaining that no new jobs existed while, at the same time, it continued to upgrade white casuals to permanent road jobs. If the chancellor's pen is less fine than the Company would choose, it is in part the result of the Company's obfuscatory tactics. In these circumstances, "it suffices for the trial court to determine the amount of back wages 'as a matter of just and reasonable inference'." *Brennan v. City Stores, Inc.*, 5 Cir. 1973, 479 F.2d 235, 242.

VII

[9] This Court has consistently held that back pay awards are not punitive. They are an integral part of the equitable relief to which discriminatees are entitled "to economically elevate [them] to the status which is rightfully theirs". *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1376. See also *United States v. Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, 921; *Carey v. Greyhound Bus Co.*, 5 Cir. 1974, 500 F.2d 1372, 1378. In determining the amount of back pay to which the discriminatee would be entitled, the trial court carefully considered numerous formulae that the parties presented for his consideration. Indeed, the trial court noted that the "variety of formulae by which individual back pay due this class of discriminatees can be computed is bewildering". *Sabala v. Western Gillette*, S.D.Tex.1974, 371 F.Supp. 385, 392.

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trial judge must be accorded wide discretion in determining criteria for the award of back pay. "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer. The District Judge is in the best position to determine this issue." Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, 421.

The trial judge computed back pay awards in the following manner. First, he selected a reasonably prudent (i. e. representative) road driver and a reasonably prudent city driver, each having characteristics representative of their peers with respect to seniority, earnings and work habits. Next, he compared the average monthly earnings of these representative drivers for the period June 3, 1968 to July 17, 1973. The trial court there found that an average road driver, on a monthly basis, earns 1.56 times the amount earned by an average city driver. The trial judge acknowledged that this method of damage calculation contains a statistical disparity and does not measure what the plaintiffs would have earned if they had been given the first available opportunity to transfer. The trial court, nonetheless, thought this formula was the best available method of estimating the back pay to be awarded.

The court then computed the discriminatee's earnings for the period from June 3, 1968 to July 17, 1973, or from his "rightful place" seniority date to July 17, 1973, whichever period was the lesser. That figure was then multiplied by a factor of 1.56, reduced by 10 percent to account for employment-related expenses, and further reduced by the amount of any "interim earnings" that the discriminatee had been able to earn while working as a city driver, which he would not have been able to earn if he had been on the road.

The inherent difficulties in computing back pay require that the district courts be allowed broad discretion:

> The method of calculating a class-wide back pay award must not be rigid. This results from the *impossibility of calculating the precise amount of back pay*. There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system, and apprentice and on-the-job training programs had not been in existence.

> Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. The process creates a quagmire of hypothetical judgments.

Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 260 (emphasis added).

In *Pettway*, Judge Tuttle recognized that there were several possible methods for computing back pay, and that the choice of method was essentially a question for the trial court, subject to our correction if the trial court's method was so unreasonable as to amount to an abuse of discretion. As Judge Tuttle suggested, the proper method of computation of back pay depends on the complexity of the case. "It should be emphasized that this is not a choice between one approach more precise than another. Any method is simply a process of conjectures . . . [E]xact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical." 494 F.2d 211, 261-62.

In the circumstances of this case, we think that the method chosen by the district court to determine back pay was not unreasonable. We find no abuse of discretion by the trial court.

VIII

[10] The plaintiffs also contend that the district court erred in framing back pay relief. The discriminatees argue that the court should have extended back pay relief to the date that each individual discriminatee achieved road driver status. Instead, the court allowed back pay relief only until July 17, 1973, the date of its first order. At the same time, the trial court conditioned payment of the back pay awards on the offer and acceptance of

road jobs in individual cases. Although logic may suggest that these two dates should coincide, we do not think that that result is required as a matter of law. We think that a court of equity, in framing its relief, is at liberty to do what the district court has ordered here.

Judge Tuttle has stated the relevant standard of review in back pay award cases: "Because of the compensatory nature of a back pay award and because of the 'rightful place' theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's *discretion to deny* back pay is narrow." Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 252 (emphasis added). In *Pettway*, the court ordered injunctive relief to aid the discriminatees in gaining and maintaining their rightful place. 494 F.2d 211, 248. Although we ordered the district court to require the company to take affirmative steps to insure that the discriminatees be given their rightful place, we did not require the district court to award back pay to the date they would actually take their rightful place. "The termination date of the back pay period for most claimants will be the date of the *district court's decree implementing our decision*, but may, depending on the employees situation, be March 31, 1971, the date testing was ended." 494 F.2d 211, 258 (emphasis added).

[11] The termination date in the present case was relatively earlier than in *Pettway* in that the district court used the date of its *initial decree* as the termination date. In the context of the particular relief ordered by the district court, the selection of that termination date was not unreasonable. We note that the trial court retained jurisdiction, although only for a period of one year, to evaluate the company's efforts in remedying the discrimination and to order further relief, if necessary. That year is now over. We are of the view, therefore, that the district court

should retain jurisdiction for such further time as may be necessary to carry out that relief.

Several problems face the trial court. As the date of its original order recedes further into the past, injury to those plaintiffs who have not yet been offered road jobs will, of course, increase and be compounded. At the same time, the *possibility* exists that proper regard for the Company's business efficiency will not permit Western Gillette to offer road jobs to all the discriminatees during that same period. The trial court must be sensitive to the needs of the discriminatees, but it must be equally vigilant in avoiding results that interfere with the company's legitimate business decisions. In these circumstances, it is the task of the trial court to balance relevant considerations and do equity. The relief granted by the trial court, limited as it was, was designed to effect this nice balance of interests.

At the same time, the district court's retention of jurisdiction demonstrates that it recognizes that further relief may be required if the company does not conform its conduct to the spirit as well as the letter of the district court's decree. On remand, the district court may, if necessary, reconsider the back pay relief granted in light of the company's ability to date to find jobs for the discriminatees. We do not, however, find any abuse of discretion in the court's failure to grant back pay to the date of achieving road driver status on the record facts.

IX

[12] The trial court found that the company and the three union defendants shared responsibility for the discriminatory practices at the heart of this dispute. Consequently, it ordered that attorney's fees should be paid by all the defendants, the company paying one-half the amount and the unions sharing liability for the other half. Without setting forth any reasons, how-

ever, it awarded the full amount of back pay liability against the company alone.

On appeal, Western Gillette contends that the trial court failed to make the unions liable for back pay because it erroneously thought that it lacked the power to do so. The trial court did not have the benefit of our decision in Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364. In *Johnson*, we held that the district court properly awarded back pay relief against the defendant union. We said:

> Common sense demands that a union be held to the natural consequences of its labors in negotiating a collective bargaining agreement.
>
> Guided by the facts of this case it would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party. The union was more than a passive participant in the contractual arrangements which furnished a substantial contribution to the discriminatory results evident here.

Johnson, 491 F.2d 1364, 1381-82.

For its part, the union points out that the trial court was made aware of the possibility of allocating back pay relief among the defendants at an early stage of the case. During its consideration of the jurisdiction issue, at the beginning of the lawsuit, the court asked counsel several questions concerning the differences between Title VII and Section 1981 cases. The following colloquy took place:

> The Court: Well, there's a Fifth Circuit opinion—I don't know whether I have it out here or not—holding that if no complaint was filed against the union, that they are not amenable to a Title VII case.

> Mr. Rosenblum: Well, of course, adequate relief of the nature which we seek can be afforded under 1981.
>
> The Court: We can't grant injunctive relief under 1981, can we? I don't know. I'm asking.
>
> Mr. Rosenblum: I think you can, Your Honor, yes.
>
> The Court: As well as damages?
>
> Mr. Rosenblum: As well as damages and--I don't think that the disparity of relief available under 2000(e) [§ 2000e] and 1981 is that——
>
> The Court: Is that different?
>
> Mr. Rosenblum: ——that controlling that it would limit their presence here.

This colloquy is not sufficient to resolve the ambiguity in the district court's order.

On remand, the court should reconsider its award of back pay in light of Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364. The trial court should also state reasons for its decision.

X

[13] The district court awarded counsel for the plaintiff class $35,000 in attorneys' fees.[14] The court found that Western Gillette was liable for one-half the amount of attorneys' fees while the three union defendants were each liable for one-third of the remaining one-half. The principle applied by the district court is that "[t]he question of attorneys' fees involves an allocation of responsibility for this discrimination among the various

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[14] The trial court also awarded Ramirez's counsel $12,500 in attorneys' fees. That sum is not contested here.

defendants". Sabala v. Western Gillette, Inc., S.D.Tex.1973, 362 F.Supp. 1142, 1155. Because the cause of action against the union defendants was grounded solely on Section 1981, the district judge's allocation of attorneys' fees among all the defendants may have been improper in light of the Supreme Court's recent decision in Alyeska Pipeline Service Company v. Wilderness Society, 1975, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141.

The district court may have allocated its award of attorneys' fees among the four defendants because it mistakenly believed that Title VII and Section 1981 equally confer the power to award attorneys' fees. "The 1964 Civil Rights Act provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs . . . The Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees." Sabala v. Western Gillette, Inc., S.D. Tex.1973, 362 F.Supp. 1142, 1155. Thus, the district court allocated liability for the attorneys' fees award among the defendants despite its finding that "the primary responsibility for the discrimination against the class is the Company's". *Id.*, 362 F.Supp. 1142, 1155.

In *Alyeska*, the Supreme Court held that attorneys' fees may not be granted against a losing party except by specific congressional authority or under one of the long-standing judicially fashioned exceptions[15] to the general rule, such as where the

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[15] Justice Marshall, in dissent, noted a logical inconsistency in the court's analysis. If courts have traditionally had the equitable power to carve out exceptions to the general rule, why has that power now expired so that the courts may now utilize the traditional exceptions but may not add new exceptions? Justice Marshall said:

> In my view, these cases simply cannot be squared with the majority's suggestion that the availability of attorneys' fees is entirely a matter of statutory authority. The cases plainly establish an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics. The Court acknowl-

losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". 95 S.Ct. 1612, 1622. The Supreme Court noted that the Court of Appeals in *Alyeska* had expressly disclaimed reliance on any of the traditional exceptions to the general rule. Explaining the relationship between the judicially fashioned exceptions and the primary responsibility of Congress the Court said:

> Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney fees; but neither has it retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, it itself to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

95 S.Ct. 1612, 1623.

The Supreme Court suggested that Congress has the power and judgment to pick and choose among its statutes and to allow attorney's fees under some statutes but not others. The

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> edges as much when it says that we have independent authority to award fees in cases of bad faith or as a means of taxing costs to special beneficiaries. But I am at a loss to understand how it can also say that this independent judicial power succumbs to Procrustean statutory restrictions—indeed, to statutory silence—as soon as the far from bright line between "common benefit" and "public benefit" is crossed. *I can only conclude that the Court is willing to tolerate the "equitable" exceptions to its analysis not because they can be squared with it but because they are by now too well established to be casually dispensed with.*

Alyeska Pipeline Company v. Wilderness Society, 1975, — U.S. —, 95 S.Ct. 1631-32, 44 L.Ed.2d 141 (emphasis added).

courts, presumably, are not able to do so in the absence of legislative guidance. Consequently, the courts may award attorneys' fees only if explicitly authorized by statute or by one of the traditional exceptions to the general rule. Congress has explicitly authorized the award of attorneys' fees in Title VII litigation. See 42 U.S.C. § 2000e-5(k). Congress has not categorically authorized the award of attorneys' fees in Section 1981 cases. Section 1981 plaintiffs must depend on one of the traditional exceptions to the general rule if they are to recover attorneys' fees.

The trial judge found authority for awarding attorneys' fees under Section 1981 in Jinks v. Mays, 5 Cir. 1972, 464 F.2d 1223. In *Jinks*, we held that "[f]ederal district courts may, in their discretion, award attorneys' fees in civil rights litigation where the actions of the defendants were 'unreasonable and obdurately obstinate'. Horton v. Lawrence County Board of Education, 449 F.2d 793 (5th Cir. 1971); Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) and Williams v. Kimbrough, 415 F.2d 874 (5th Cir. 1969)." *Jinks*, 5 Cir. 1972, 464 F.2d 1223, 1228. The Supreme Court explicitly recognized the *Jinks* exception to the general rule against the award of attorneys' fees in *Alyeska:*

> This Court's summary affirmance of the decision in Sims v. Amos, 340 F.Supp. 691 (M.D.Ala.), aff'd. 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), cannot be taken as an acceptance of a judicially created private attorney general rule. The District Court in *Sims* indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees. 340 F.Supp. at 694. See also Edelman v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662 (1974).

Alyeska Pipeline Co. v. Wilderness Society, 1975, — U.S. —, 95 S.Ct. 1612, 1628, n. 46, 44 L.Ed.2d 141.

The language of the district judge's opinion is ambiguous, however, as to whether he construed *Jinks* to allow an award of attorneys' fees in all Section 1981 cases or only where the defendants acted in bad faith.

On remand, therefore, the district judge should determine whether the union defendants are liable for attorneys' fees under one of the exceptions to the general rule.

XI

[14] The plaintiffs contend that the court's award of $35,000 in attorneys' fees to the attorneys for the class was inadequate in amount. The trial court based its award on a finding "that the amounts . . . are reasonable under the circumstances in light of the time spent in preparation and litigation of the cause, the complexity of such preparation and litigation, and the novelty of the issues." Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385, 394.

Without expressing any opinion on the ultimate issue of the adequacy of the attorneys' fees awarded, the conclusory language of the trial judge's order effectively prevents any meaningful review of the award made. "The fixing of attorney's fee must be left to the discretion of the trial judge, but the failure below to state the premise for limiting the award gives us no basis to determine whether that discretion was properly exercised." Mims v. Wilson, 5 Cir. 1975, 514 F.2d 106.

On remand, the district court should provide a statement of reasons supporting the amount of this award and, if necessary, take further evidence on the issue.

* * *

The judgment of the district court is affirmed in part, reversed in part, and remanded.

APPENDIX E

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 74-2711

D. C. Docket No. CA-71-H-961; 71-H-1338

Oliver I. Sabala, Individually and on
behalf of all others similarly situated,
Plaintiff-Appellee-Cross-Appellant,

v.

Western Gillette, Inc., et al.,
Defendants-Appellants-Cross-Appellees.

Leonard M. Ramirez,
Plaintiff-Appellee,

v.

Western Gillette, Inc., et al.,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

Before Wisdom, Simpson and Roney, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that costs be taxed one-half against Western Gillette, Inc., one-fourth against So. Conference of Teamsters and one-fourth against International Brotherhood of Teamsters.

August 4, 1975

Issued as Mandate:

APPENDIX F

Title 42, United States Code

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-788

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, and SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners,*

v.

OLIVER I. SABALA, Individually and on Behalf of All Others Similarly Situated, and LEONARD M. RAMIREZ, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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ERRATA

On page 13, first line of the first full paragraph, substitute the word "gainsaid" for the words "again said" ahead of the word "that".

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 516 F.2d 1251, and is reproduced in the Appendix to the Petition for Certiorari (App. pp. A-51-90).

The Opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 362 F.Supp. 1142; and the Remedial Order is reported at 371 F. Supp. 385. Both are reproduced in the Appendix to the Petition for Certiorari (App. pp. A-1-50).

JURISDICTION

While Respondents do not question the jurisdiction of this Court as set forth in the Petition, we note that Western Gillette, Inc., an Appellant below, whose interest will be greatly effected by a grant of Certiorari, has filed a petition for a rehearing and a suggestion for a rehearing *en banc* with the United States Court of Appeals for the Fifth Circuit; the petition and suggestion are presently pending before that Court.

QUESTIONS PRESENTED

The Petitioners set forth no questions assertedly presented by the Petition. The statement of the case and the Petitioner's argument in fact indicate the questions are as follows:

1

Whether a Labor Union violates 42 U.S.C. § 1981 by establishing and continuing a seniority system which gives present effect to past discriminatory practices?

2

Whether, given a finding that a Seniority System, neutral on its face, operates to freeze the status quo of prior discriminatory employment practices, 42 U.S.C.

§ 1981 empowers a Federal District Court to order the relief necessary to eliminate the present effect of past discriminatory practices?

3

Whether the International Brotherhood of Teamsters' failure to take those precautions necessary to assure equality of employment opportunities to its minority members violates 42 U.S.C. § 1981?

STATEMENT OF THE CASE

The Petitioner asserts that this case is, in all important respects, identical to *International Brotherhood of Teamsters v. United States* (No. 75-636), and *Southern Conference of Teamsters v. Rodriguez* (No. 75-715). Respondents have not been furnished with copies of the Petitions for Certiorari filed in the foregoing cases, nor are they acquainted with the records in those cases. They are however, intimately aware of the record in the instant case.

After twenty-two days of bifurcated trial during which testimony was taken from thirty-three witnesses including seventeen of the twenty-three class members, seven officers or employees of the company[1] and six officers or agents of the various Union defendants, the District Court held, *inter alia*, that all three Union defendants were responsible by commission and omission for "locking" the class members into the less desirable city driver jobs at the company's terminal in Houston, Texas. The assignment of responsibility was bottomed on the proposition that

1. Western Gillette, Inc.

the Union defendants knew[2] that separate city and road driver classifications, as the Union *interprets*[3] that con-

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2. At trial, the Court examined Mr. Donald E. Cantley, President of the Company;

Q. What have you done to try to elleviate that situation and what did you do in your negotiating with the Union? *I assume the Union must have the same knowledge as you about the problem.* Do you think so?

A. *They're very much aware of the problem.* (Emphasis supplied)

R. pp. 1127-1128 (Reference will be made throughout to the Record on Appeal by "R" followed by the page numbers.)

3. Mr. Billy Lacy, called by the Company, acknowledged that nowhere in the contract is forfeiture of seniority on transfer from city to road provided for, *viz*:

Q. (By Mr. Rosenblum) But does it say anywhere—I'm still rather confused. I appreciate that there must be terminal seniority, but does it say anywhere that if a man transfer from city to road, he must resign and start at the bottom of the road seniority roster? A. If your question is, is there language that states this, no, there is not language that states this. No.

R. pp. 864-865.

Q. (By Mr. Rosenblum) Just for the record, Mr. Lacy, then, it is true that the contract, in addition to not providing the transfer language, also does not require two seniority rosters be kept? There is no requirement that two seniority rosters be kept? A. There is no language in the contract that states that two seniority rosters must be kept—

Q. Okay. A. —as such.

Q. And as to reasons for two rosters, would you agree that a decision was made that separate bargaining units required this sort of transfer policy and the maintenance of two rosters—that is, your company, and I must conclude, the union, by common enterprise, have decided this? Would you—or do you have knowledge of that? A. Well, I suppose it was arrived at many years ago like that, yes.

Q. And as to the membership of the union locally and nationally, we have heard much reference, and I know you have been sitting here representing the company, to ratification by the membership of the union. Is the question presented to the union members that separate seniority rosters would be kept, at their ratification meetings? A. I couldn't answer that. They wouldn't let me into those meetings.

Q. When you were a road driver here in 1965, was this issue presented to you when you voted to ratify the '67 contract? A. I don't believe that it was ever brought up, to my knowledge.

R. pp. 874-875.

cept, freeze Mexican American and black city drivers into the less desirable position of city driver, and refused to either modify the National Master Freight Agreement or to square its interpretation of the contract with the requirements of the law.

Nowhere, as Petitioners assert, is the requirement of seniority forfeiture "set out" [4] or "provide[d] for" [5] in the National Master Freight Agreement, or its supplements.[6]

Petitioners assert that it is "undisputed fact" that "employees in both city and road job classifications have historically and continuously preferred this separation of road and city job bidding and lay-off seniority".[7] That simply is not the case at Houston, Texas, where this cause arose, *viz*:

> "Local No. 988 [8], under instruction of its membership, petitioned the National Bargaining Committee to merge the seniority list of city drivers and over-the-road drivers retroactively, thereby exercising all

4. See, Petition for Certiorari, p. 4.

5. *Id.*, p. 6.

6. Finally, the basic seniority issue in this issue in this case—whether a discriminatee should be allowed to transfer from city operations to LD [long distance] (and thus from one contract to another) with full carryover terminal seniority—is neither specifically prohibited nor even addressed by the contracts before the court and certainly not that of local supplements. (Citations omitted) *U.S. v. T.I.M.E.-D.C. Inc.*, 517 F.2d 299, 310-311 (5th Cir. 1975). Petition for Certiorari pending *sub nom International Brotherhood of Teamsters v. United States* (No. 75-636).

7. Petition for Certiorari, p. 7.

8. Local 988, IBT is the local union in the case *sub judice;* they too have petitioned this Court for Certiorari—saying that they are not responsible. The chorus of "not responsible" union entities is complete.

> of its available influence in favor of the seniority changes which were subsequently ordered by the District Court. The duly transmitted resolution was not concurred in." *Teamsters Freight, Tankline & Automobile Industry Employees, Local No. 988 v. Oliver I. Sabala, et al* (No. 75-781), October Term, 1975), Petition for Certiorari, p. 7

The Petitioners misconstrue the Trial Court's decision when they suggest that seniority was awarded upon the existence of "modified system seniority" and "changes of operation" within the Southern Conference.[9] The Court of Appeals for the Fifth Circuit correctly recognized that the modified seniority system effectively extends the road drivers' universe of job opportunities to the whole of the Southern Conference. It further correctly observed that the award of "rightful place" seniority to the discriminatees was predicated on factual determinations by the Trial Court that ten of the discriminatees would have accepted over-the-road employment anywhere in the Southern Conference, while thirteen would have accepted over-the-road only at the Company's Houston facilities. Modified system seniority was relied upon by the Trial Court only to define the world of job opportunities *in futuro,* while "rightful place" seniority was properly predicated upon the jobs to which each individual discriminatee would have acceded "but for" the company's original discrimination in hiring, and the unions' "lock-in" discrimination. The Circuit Court enthusiastically affirmed these remedial portions of the Order. Petition for Certiorari, App. pp. A-75 - A-77.

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9. Petition for Certiorari, p. 9.

REASONS FOR DENYING THE WRIT

1

A Labor Union Violates 42 U.S.C. §1981 By Establishing and Continuing a Seniority System Which Gives Present Effect to Past Discriminatory Practices

Recognizing that effective implementation of the Thirteenth Amendment required legislative identification of the specific civil rights protected, Congress enacted §1 of the Civil Rights Act of 1866.[10] As written, the Act clearly intended to carry out "the Amendment abolishing slavery" by doing away with "the incidents and consequences of slavery" and to "instate the freedman in full employment of that civil liberty and equality which the abolition of slavery meant". *Blyew v. United States*, 80 U.S. 581, 595, 601 (1871), dissenting opion of Justice Bradley.

While Justice Bradley recognized the fundamental purposes of the Thirteenth Amendment and its enabling legislation, he was to conclude, in a later case, that the prohibitions contained therein could constitutionally embrace only the most "fundamental rights".[11] In the *Civil*

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10. Act of April 9, 1866, Ch. 31, §1, 14 Stat. 27, Re-enacted by §17 of the Enforcement Act of 1870, Act of May 31, 1870, Ch. 114, §18, 16 Stat. 140, 144 and codified in §§1977, 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§1981, 1982.

11. *Civil Rights Cases*, 109 U.S. 3 (1883). Recognizing that Congress had the power to define and prohibit badges and incidents of slavery, Justice Bradley found that Congress could not, by its enabling legislation, adjust what he characterized as "social rights". To support this conclusion he called attention to the Civil Rights Act of 1866, and noted that "Congress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights . . ." *Id.* at 22 While Justice

Rights Cases, 109 U.S. 3 (1883), this Court was faced with the issue of whether Congress exceeded its authority under the Thirteenth Amendment in enacting §§1 and 2 of the Civil Rights Act of 1875. Justice Bradley, writing for the majority, ruled that discrimination against blacks in access to railroads, inns and theaters was not a "badge of slavery" and could not be protected by Congress under the implementing clause of the Thirteenth Amendment. This decision sparked one of the great dissents of American jurisprudence. Justice Harlan, finding that the majority opinion rested on grounds "entirely too narrow and artificial",[12] recognized that private acts of racial discrimination *are* badges of servitude which Congress has full power under the Thirteenth Amendment to correct. Anticipating the practical consequences of the Court's holding, Justice Harlan warned: "there cannot be in this Republic any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."[13]

Two decades later, this Court held that the United States did not have the constitutional power to punish individuals who deprived blacks of their freedom of contract—refusing to accept the proposition that their inability to contract was a badge of slavery. *Hodges v. United States,* 203 U.S. 1 (1906). Again, Justice Harlan dissented. Some sixty years after *Hodges,* Justice Harlan's position

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Bradley sought to narrowly define what constituted a "fundamental right" he specifically recognized that the "disability . . . to make contracts . . . [is an] inseparable incident[s] of slavery." Id. See, Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Hous. L. Rev. 2, 371 (1975).

12. *Id.* at 26.

13. *Id.* at 62.

was vindicated. *Jones v. Alfred H. Mayer Co.*, 302 U.S. 409 (1968). In *Jones*, this Court found "that §1982 operates upon the unofficial acts of private individuals whether or not sanctioned by State law . . ." *Id.* at 437;[14] and, more importantly, expressly overruled this Court's earlier holding in *Hodges, supra.*[15]

Based on this Court's finding in *Jones* that "the right to contract for employment, [is] a right secured by 42 U.S.C. §1981",[16] the lower courts have consistently found that §1981 proscribes racial discrimination in private employment. *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1971), cert. denied, 409 U.S. 982 (1972); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970) cert. denied, *sub nom, Dobbs House, Inc. v. Sanders*, 401 U.S. 948 (1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied, 404 U.S. 916 (1972); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1975), cert. denied, 400 U.S. 911 (1070); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.* 478 F.2d 979 (D.C. Cir. 1973). And in *Johnson v. Railway Express Agency*,____ U.S.____, 44 L.Ed.2d 295, 301 (1975), this Court held, *inter alia*, "that §1981 affords a federal remedy against discrimination in private employment on the basis of race".

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14. While *Jones* was an action under §1982, this Court recognized that both §1981 and §1982 had their genesis in §1 of the Civil Rights Act of 1866, *Jones, supra*, at 441, n. 78.

15. "Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled". *Id.*

16. *Id.*

On this basis, the lower Federal Courts have not hesitated to subject labor unions to the scrutiny of §1981 when the union has been charged by an aggrieved employee with impairing that employee's ability to make or enforce an employment agreement because of his race. *Young v. International Tel. & Tel. Co., supra; Guerra v. Manchester Terminal Corp.,* 498 F.2d 641 (5th Cir. 1974); *Waters v. Wisconsin Steel Works, supra; Macklin v. Spector Freight Systems, Inc., supra; Johnson v. Ryder Trucklines, Inc.,*____F.Supp.____, 10 EPD ¶10, 535 (W.D. N.C. 1975).

Thus, the question then becomes whether a labor union which knowingly[17] establishes a seniority system that perpetuates the past discriminatory practices of an employer has impaired the employee's ability to contract for employment. The lower Courts have consistently answered this question in the affirmative. *Guerra, supra; Johnson v. Ryder Trucklines, Inc., supra.* These holdings are necessarily founded upon a judicial recognition that the employee-union relationship is a critical link in the chain of the employee-employer contract. *James v. Ogilvie,* 310 F. Supp. 661 (D.C. Ill. 1970); *Dobbins v. International Brotherhood of Electrical Workers,* 292 F. Supp. 413 (D.C. Ohio 1968). ". . . the acts of the Union . . . impair plaintiffs right to make and enforce contracts within the meaning of 42 U.S.C. §1981". *Gray v. Bartenders Union,* ____F. Supp.____, 10 FEP Cases 496, 498 (N.D. Cal. 1975).

In this case, based upon the extensive record before it, the Trial Court held that the dual seniority system as interpreted and applied by the Union, locked in past discrimination because it discouraged minority employees

17. See, n. 2, supra.

from transferring from the less desirable city driver positions to the more desirable road positions from which they had been previously excluded because of their race.[18]

But for the Company's original discrimination, Respondents would have been over-the-road drivers in the past; and, but for the Union's interpretation of the contract which it negotiated requiring that a city driver forfeit his accumulated job seniority on transfer to a different classification, Respondents could become over-the-road drivers today. The implication is obvious. Because of the interpretations placed on the collective bargaining agreement by the Petitioners, Respondents are in no better position today than they were yesterday to contract for those jobs which were formerly denied to them because of their race. See, *e.g., Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 235 (10th Cir. 1970), cert denied, 401 U.S. 954 (1971).

Accordingly, Respondents submit that Petitioners have not presented a substantial question of law which merits review by this Court.

2

When a District Court Finds That a Seniority System, Neutral on Its Face, Operates to Perpetuate Past Discriminatory Employment Practises, That Court is Empowered By 42 U.S.C. §1981 to Order the Relief Necessary to Eliminate the Present Effect of the Past Discriminatory Practices

Unless a statute in so many words, or by necessary inescapable inference, restricts the Court's jurisdic-

18. Petition for Certiorari, App. pp. A-20 - A-21.

> tion in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light interferences, or doubtful construction.' *Brown v. Swann,* 10 Pet. 497, 503. . .

Porter v. Warner Holding Co., 328 U.S. 395, 397 (1946).

Thus, "[W]hen congress entrusts to an equity court the enforcement of prohibition in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief tin light of the statutory purposes." *Mitchell v. De Mario Jewelry,* 361 U.S. 288, 292 (1960).

On this basis, this Court has recognized that where a violation of a federally protected right is involved, the courts "must be alert to adjust their remedies so as to grant the necessary relief". *Bell v. Hood,* 327 U.S. 678, 684 (1946).And where racial discrimination is concerned, the courts not only have the discretionary power but "the duty to render a decree which will so far as possible eliminate discriminatory effects of past as well as bar like discrimination in the future. *Louisiana v. United States,* 380 U.S. 145, 154 (1965). Simply put, "the compensation is to be equal to the injury", assuring that "the injured party is placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock,* 6 Wall 94, 99.

Finding that § 1981 "on its face relates primarily to racial discrimination in the making and enforcement of contracts" this Court has observed that "*remedies* available to an individual under Title VII are coextensive with the individual's [sic] right to sue under the provisions of

the Civil Rights Act of 1866, 42 U.S.C. § 1981. . ." (emphasis supplied, citations omitted) *Johnson v. Railway Express Agency, supra,* at 301. Accord, *Carter v. Gallagher,* 452 F.2d 315 (1971), cert denied 406 U.S. 950 (1972). And it is well established that "[I]t is [also] the purpose of Title VII to *make persons whole* for injuries suffered on account of unlawful employment discrimination." (Emphasis supplied) *Albermarle Paper Co. v. Moody,*____U.S.____, 45 L.Ed.2d (280, 297, (1975).

In light of the foregoing, it cannot be again said that in the case *sub judice* the Trial Court fulfilled its obligation to fashion a remedy that provided the necessary relief. *Bell v. Hood, supra.* As mentioned amove, the Trial Court had before it massive oral testimony. Based upon the testimony taken at trial and upon the evidence received, the Court concluded that "rightful place seniority" should be awarded based upon jobs available to the discriminatees both in Houston and in the Southern Conference. "Houston discriminatees' " seniority was based upon over-the-road jobs available at Houston, Texas, and "Southern Conference discriminatees' " seniority was based upon jobs available within the Southern Conference.[19] The Trial Court then ordered that all discriminatees be offered the next available over-the-road jobs, as openings occurred, anywhere within the Southern Conference,[20] and the Court articulated its reasoning.[21] The evidence supported the Court's remedy.[22]

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19. Petition for Certiorari, App. pp. A-34 - A-35.

20. *Id.* pp. A-36 - A-38.

21. *Id.* p. A-39.

22. The Trial Court had abundant testimony upon which it properly concluded that the universe of over-the-road job opportunities

Both the Trial Court and the Court of Appeals heard argument that the Houston terminal was suffering a

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was at least the Southern Conference of Teamsters (composed of eight Southern states).

Mr. Harold Elliott, was called as a witness for the Company and testified as to the procedure followed when he received an application for over-the-road employment during the time that he was operations manager for the Company:

Q. Uh-hum. A. I explained that I would explain the procedure that he would have to foller. I said, to my knowledge, there's no available positions on the road but, first, in all, you will have to resign your position as a city driver if in the event the company does have an opening. This does not mean that you lose your company seniority, but you go on the road at the bottom of the board. I said we can notify Los Angeles and they will make the decision *as to the terminals where there might be a job opening*. (Emphasis supplied) R. p. 1597.

Mr. Coylie Blake, a city driver for the Company, and a Union Steward was called as a witness for the local union and testified on direct examination, as follows:

Q. Now, we've also had testimony, Mr. Blake, relating to statements concerning offers of line jobs in 1968.

Let me ask you if you were ever offered a line job? A. Yes, sir, I was.

Q. Who offered you the line job? A. Well, it come from the higher authority. It come from Mr. Larry Jones out of L.A.

Q. Approximately when was that? A. It was in '68.

Q. And where did the offer take place? A. *These open places, Miami, Oklahoma and St. Louis, I think, and Chicago.* (Emphasis supplied).

Q. Did you accept the offer? A. No, sir, I didn't want it.

Q. Have you had any opportunity since that time? A. Yes, sir, I have.

Q. Have you ever accepted the offer? A. No, sir, I haven't.

Q. First of all, let me ask you, under what conditions was the offer made? That is, what happened to your city seniority, or was that discussed? A. It wasn't discussed because I didn't want the job. R. pp. 1719-1720.

Mr. Cantlay, the President of the Company, testified on direct examination:

Q. Now, you have mentioned under Article 42 that we've been talking about, we have a slightly different situation as to line.

What is the, as you read and interpret the contract, what is the terminal, if I can use that phrase, for seniority purposes of line men

business decline.[23] Considering the "business decline" testimony and to insure that each discriminatee would be made whole, the Court ordered the requisite remedy; a meaningful opportunity in the future that had been denied in the past. The Trial Court fashioned a remedy calculated to place the discriminatees in the positions they would have been but for the Company's hiring discrimination and the Union's lock-in discrimination.

The Petitioners' "but for" question[24] is specious. It is calculated to cause this Court to review the facts upon

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in the Southwest area? A. Well, Southwest has a rather unique seniority roster in line. They, in effect, have two seniority rosters, both of which are modified.

One is a Houston line driver will have a seniority roster that applies to Houston insofar as he's concerned, and he also has a roster for Western Gillette that covers the entire Southwest area. He's on both rosters.

If anything changes in the operation, or layoff, or whatever, that affects that roster, that Southwest roster, the men that are on high seniority have the opportunity to bump, under certain conditions, into any one of these other areas when they can.

Q. Are you telling me that if the man is deciding what run he's going to take, his seniority roster is Houston? He's working out of Houston? A. Yes.

Q. Now, does he have a terminal which is the Southwest area for purposes of deciding where he may work if his seniority is superior to somebody else's, provided he's on layoff and wants to go to other plant's place? A. You'd have to read the conditions and be very specific, but that's correct. The man could, under certain conditions, pick the location where he would perform his line of work and have his seniority placed there with the other men, according to his overall Southwest seniority.

Q. For purposes, then, of the general interpretation of the agreement, when you speak of terminal seniority under a specific contract, you are talking about the work classification that comes under that supplemental contract? A. That's correct.

Q. It may be at a given point or it may be at a combination of places? A. For the line people.
R. pp. 1117-1119.

23. Petition for Certiorari, p. A-66.

24. Petition for Certiorari, p. 3, Question Presented No. 3.

which the Trial Court predicated the remedial portion of its Order. The Court of Appeals carefully examined the remedial aspects of the Trial Court's Order and concluded, "[I]n light of all the circumstances here, we think that this part of the relief ordered by the Trial Court was properly within the statutory discretion and conformed to its responsibility to frame an efficacious remedy". Petition for Certiorari, App. p. A-77. Petitioners do not bring before this Court a substantial question of law, nor a question of law at all; rather they attempt, for the third time, to reargue facts which are not supported by the Record. Respondents submit that certiorari should not be granted for this purpose.

3

The International's Failure to Take Those Precautions Necessary to Assure Equality of Employment Opportunities to its Minority Members Violates 42 U.S.C. §1981

In question 2 of their Petition the International asks whether it may be held liable under 42 U.S.C. §1981 for seniority rules which are incorporated into an alleged locally negotiated collective bargaining agreement. As stated, Petitioners have again made factual assertions which are not supported by the Record. To the contrary the Record supports the Trial Court's finding[25] that the International is significantly involved in negotiating the discriminatory seniority rules of the collective bargaining agreement.[26] The Record additionally supports the proposi-

25. Petition for Certiorari, App. p. A-29.

26. Mr. Lloyd Turner, ex-business representative of Local 988 was called by the Local and asked to explain the negotiation of the

tion that the International exercises significant control

National Master Freight Agreement. On direct examination he testified:

Q. Now, let me see if I—if my understanding of his testimony was correct, that that group of delegates would vote as an entire group on what proposals to submit to management? A. Well, prior to that, each local union had sent in their proposals, as has been testified, and Smith had. Then the International Union, its area conferences, selected their negotiating committees from these, as it's been testified. R. p. 1822.

Q. Well, do I understand you that the ballot—that *a ratification is not done on a local basis?* A. *Well, it is not, no.* No local union does that, or hasn't in the last two contracts.

Q. Do you have any way of knowing how the membership of, say, your local voted on the last contract? A. None whatsoever, no. (Emphasis supplied) R. p. 1827.

Q. If the membership themselves, and that is the membership that are engaged in the trucking industry, had not voted for that authorization, as I understand prior witnesses, you would not be included in the National Freight agreements? A. I would not have had the authority to give the power of attorney to the International Union had our membership not voted such.

The International oversees the activities of the Locals. Mr. W. C. Smith, an organizer employer by the International Union, and called by the International, testified on direct examination:

[A] *The International Union, in order to protect the local unions,* notified them to open their contracts. In addition to this—

Q. Let me put in a paragraph there. You said the International Union *notified* the local unions to open up their contracts, and then it is the local unions that do what? A. Open the contract, notify the employer that they wish to make changes in that contract. The International Union only notifies them as an effort to prevent somebody from—for getting and failing to open the contract. (Emphasis supplied) R. p. 1311.

Q. All right. What happens after that? A. After the contracts are opened, the local union is also *alerted* to post notices or get their membership in the meetings, to take proposals or suggestions for changes in that contract.

They're also *instructed* to make arrangements to have votes taken on power of attorney for the Southern Conference and the International Brotherhood of Teamsters to have authority to bargain in their behalf in the national contract negotiations. (Emphasis supplied). R. pp. 1312-1313.

Q. Now, it is correct, is it not, that without the power of attorney the Southern Conference negotiating committee and the national—

over the Conference and the Local.[27] Moreover, lower Federal Courts facing the identical issue have consistently found that the degree of the International's involvement is sufficient to create liability. See, *e.g., United States v. Navajo Freight Lines, Inc.*, ____F.2d____, 11 FEP Cases 787 (9th Cir. 1975); *United States v. T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), Petition for Certiorari pending; *Johnson v. Ryder Trucklines, supra; Cathey v. Johnson Motor Lines, Inc.*, 398 F. Supp. 1107 (W.D. N.C. 1974); *U.S. v. Pilot Freight Carriers, Inc.*, 54 FRD 519 (M.D. N.C. 1974); *United States v. Lee Way Motor Freight, Inc.*, ____F. Supp.____, 7 EPD ¶9066 (W.D. Okla. 1973); Accord, *Barnett v. W. T. Grant Co.*, ____ F.2d____, 9 EPD ¶10,199 (4th Cir. 1975); and *Myers v. Gilman Paper Corp.*, 392 F. Supp. 413 (S.D. Ga. 1975).

However, Respondents recognize that there appears to be an aberration within the Fifth Circuit with respect to the International's liability. Compare *Herrera v. Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir., 1974), Petition for Certiorari Pending, *sub nom Southern Conference of Teamsters v. Rodriguez*, (No. 75-715) and *Resendis v. Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974) Petition for Certiorari Pending, *sub nom Southern Conference of Teamsters v. Rodriguez* (No. 75-715), with *Sabala v. Western Gillette, Inc.*, 516 F.2d

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however it goes—well, the national cartage et cetera, et cetera, committee has no authority to bargain on behalf of that local union with that particular employer unless it has that power of attorney? Is that correct? A. If the local union would refuse to send in their power of attorney, the conference of the international would be under the assumption that they did not wish to be spoken for on national negotiations.

27. *Id.*

1251 (5th Cir. 1975) and *U.S. v. T.I.M.E.-D.C., supra.* The touchstone for finding the International liable is dependent on a factual showing, at trial, of the International's critical involvement in the negotiating process and its substantial control over the affairs and activities of its affiliated Locals and Conferences. See, e.g., *U.S. v. Navajo Freight Lines, Inc., supra; U.S. v. T.I.M.E.-D.C., supra; Johnson v. Ryder Trucklines, Inc., supra;* and *Cathey v. Johnson Motor Lines, Inc., supra.* In this case, Respondents made the necessary proof. Thus, the inconsistency asserted by Petitioners is nothing more than differing factual determinations within the same Circuit. Respondents submit that this Court is not the proper tribunal for harmonizing differing factual conclusions within the same Circuit.[28]

The International Brotherhood of Teamsters has been acutely aware of the situation that has precipitated this litigation.[29] They have done nothing to rectify the odious consequences of the Agreement;[30] to the contrary they

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28. The Honorable John Miner Wisdom was the architect of the *Sabala* decision as well as the *Rodriguez* trilogy. Presumptively, had there been true inconsistencies, they would have been reconciled.

29. See n. 2, supra.

30. Mr. Donald E. Cantlay, President of the Company has participated in the national negotiations of the discriminatory agreement; he testified on direct examination:

Q. At the time any—any of the time you have been sitting on the negotiating group for the industry in the national contract, can you ever remember a time when the union representatives, for any of the bargaining units that you were involved with, ever made a specific proposal to change the present practices and systems of having seniority treated separately in each contract? A. I don't quite understand what you mean.

Q. My question is whether or not in the negotiations, has there ever been a proposal that would have resulted in a single seniority system for all people or all people in different categories, line and city? A. No, I do not. R. 977-978.

have continued to interpret it in a fashion that locks Respondents and hundreds of thousands of persons similarly situated into city driver positions.[31] At trial, a spokesman for the International Brotherhood of Teamsters suggested that nothing could be done to resolve "the problem".[32] The International misconstrues its affirmative obligation under §1981 to take those steps necessary to eliminate the true cause of the present effects of the Company's discriminatory hiring practices. This acquiescence, inertia and passivity at the negotiating table and elsewhere has operated to deprive Respondents of those very rights which §1981 was enacted to secure. This conduct is in violation of §1981, and the courts have so held. *Myers v. Gilman Paper Corp., supra; Johnson v. Ryder Trucklines, Inc., supra* and *Cathey v. Johnson Motor Lines, Inc., supra.* Accord, *Macklin Spector Freight Systems, Inc., supra.*

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31. The National Master Freight Agreement embraces more than 400,000 truck drivers.

32. On examination by the Court, W. C. Smith, an organizer for the International, testified as follows:

The Court: Well, all you're saying is that where you have situations like Western Gillette where there are a 125 road drivers, two blacks and two Mexican-Americans, and you have city road drivers that would like to move but they don't want to give up their seniority, there's just not anything that can be done? They're just trapped, that's all?

The Witness: My answer would be this, that I don't think that anyone can look at Western Gillette in Houston, Texas, and say, "Here's the problem and here's the answer."

I think that you've got to look at the United States. I think you've got to look at 400,000 people. I think that—

The Court: I don't have jurisdiction over all.

The Witness: I understand that. I do not believe there's a simple answer.

The Witness: *Well, in all courtesy to the Court, I think that the answer is this: There's nothing any of us can do about the last 200 years.* (Emphasis supplied) R. 1341-1342.

Recognizing that "[T]he conclusion is inescapable that . . . Section 1981 and Title VII . . . overlap to the extent of prohibiting union and employer racial discrimination . . ." *Macklin, supra* at 997, the lower Courts properly held the International Brotherhood of Teamsters liable, not only because of their extensive involvement in establishing the discriminatory seniority system, but also because of their informed decision to not remove those "artificial, arbitrary and unnecessary barriers to employment . . . that operate as built-in headwinds for minority groups". *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should, in all respects, be denied.

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No. 75-788

In the

Supreme Court of the United States

October Term 1975

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND SOUTHERN CONFERENCE OF TEAMSTERS,

Petitioners,

vs.

OLIVER I. SAEALA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND LEONARD M. RAMIREZ,

Respondents

ON PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

REPLY TO RESPONDENTS' OPPOSITION

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Cases Cited

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Respondents

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To the United States Court of Appeals
For the Fifth Circuit

REPLY TO RESPONDENTS' OPPOSITION

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "International") and Southern Conference of Teamsters (hereinafter "Southern Conference") respectfully reply to Respondents' Opposition to Petition for Writ of Certiorari as follows:

Respondents in their Opposition decline to acknowledge

or respond to the questions presented in this Petition. (See Opposition, p. 2.) Instead, Respondents fashion their own questions which reduce, at bottom line, to: whether Title 42 U.S.C. Section 1981 prohibits discrimination in employment?

Obviously, that is the purpose and effect of Section 1981. But it is equally obvious that this case presents no such simple issue.

Respondents' failure to address the questions of law presented in the Petition fatally infects their argument as to reasons for denying the Writ. Unable or unwilling to confront the important legal issues raised, they instead concoct false issues of fact.[1] (See Opposition, pp. 16-19.) The overriding[2] questions remain: whether an otherwise legal, bona fide seniority system illegally discriminates simply because it does not *automatically* grant seniority to employees whom an employer has discriminatorily excluded from the bargaining unit; and whether minority employees should, as a remedy, be granted seniority relief *greater* than that they would have had "but for" discrimination. Nothing in Respondents' Opposition detracts from the im-

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[1] For example, Respondents argue that a majority of Houston city drivers desire merged city and road job seniority, when the trial court found to the contrary and refused to order merger. (App. A-25.) Similarly, they argue that applicable seniority rules are negotiated on a national rather than regional basis, when the Fifth Circuit has found to the contrary. See *Herrera* vs. *Yellow Freight Systems*, 505 F.2d 66 at 68, fn. 2 (5th Cir. 1974).

[2] Of no less importance is the conflict between the Fifth Circuit's holding in the instant case and that in *Herrera, supra* fn. 1. (See Petition, pp 15-16.)

portance of the legal issues thus presented, or warrants denial of this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Respondents' Opposition on Petition for Writ of Certorari have this ..... day of January, 1976, been mailed, postage prepaid, to all counsel of record as follows:

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